(16,079.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 78.

J. B. CESSNA, KATE CESSNA, HIS WIFE; JOHN R. KEEDLE, ET AL., APPELLANTS,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

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1 *Transcript of the John Gid or John Heath Case.*

J. B. CESSNA *et al.*
vs.
THE UNITED STATES OF AMERICA.

Tried May term, A. D. 1895.

Counsel:

For plaintiffs: J. B. Cessna (*per se*) and T. B. Catron, for the petitioners.

For defendant: Matt. G. Reynolds, Esq., Summers Burkhart, Esq., for the United States; F. Springer, Esq., H. L. Waldo, Esq., S. B. Newcomb, Esq., E. A. Fiske, Esq., J. W. Vroom, Esq., for certain respondants.

2 UNITED STATES OF AMERICA, } *ss:*
Territory of New Mexico, }

Be it remembered that heretofore, to wit, on January 9th, A. D. 1893, J. B. Cesna *et al.*, by their attorney, J. B. Cesna, Esq., filed in the office of the clerk of the court of private land claims in and for the Territory of New Mexico a petition, in which said J. B. Cesna *et al.* are plaintiffs and The United States of America is defendant; which said petition is in the words and figures following, to wit:

2½ Copy.

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

In the matter of private land claim of Dr. John G. Heath (Juan Gid).

In the Court of Private Land Claims, Santa Fé, New Mexico.

J. B. CESSNA, KATE CESSNA, His Wife; JOHN R. KEEDLE, MARY E. Keedle, His Wife; Esther G. Hunter, Eliza J. Bibb, Malon A. Bibb, Her Husband; Robert W. Sherman, Amelia C. Sherman, His Wife; Alice Wood, Alice N. Scott, Widow; James Scott, Guardian of L. Ethel Scott, Lucretia Scott, and Mabel Scott, Minor Children of Charles W. Scott, and Francis J. Heath, Widow of Robert J. Heath, Deceased, Grantees, Heirs, and Legal Representatives of John G. Heath, Deceased,
versus
THE UNITED STATES OF AMERICA and THE UNKNOWN OWNERS of the Doña Ana Bend Colony, Mesilla Colony, and Bracito Grants.

To the Honorable Joseph R. Reed, chief justice, and to the associate justices of the court of private land claims:

Your petitioners, the above-named plaintiffs, bring this their petition against the United States and others above named, and respect-

fully represent that said petitioners are the heirs-at-law and legal representatives of one John Heath, otherwise known and called by the Mexican people and authorities residing at Paso del Norte, in the present State of Chihuahua, in the Republic of Mexico, by the name of Juan Gid, that being the name, as spelled, which nearest corresponded in the Spanish language to John Heath in the English language, and thereupon your petitioners allege and say that on or about the twenty-seventh day of December, A. D. 1822, said John Heath alias Juan Gid addressed a petition to the Emperor of Mexico, through the office of the secretary of state of Mexico, requesting a grant to the lands and properties hereinafter mentioned and described, which said petition is not in the power, possession, or control of your petitioners, and they are not able to furnish a copy thereof; that on the third day of April, A. D. 1823, said John Heath alias Juan Gid applied to the ayuntamiento of El Paso, in the present State of Chihuahua, in Mexico, to know what had been done with his said petition which he had forwarded to the said Emperor through the former ayuntamiento of said town; whereupon he was informed that no reply had been received from the same, but that
3 through the civil and military governor or chief, in an official communication of March 2nd, A. D. 1823, there had been transmitted to said ayuntamiento and commanded to be published and carried out the decrees of the third of March of that year, emanating from the organic national junta and sanctioned by His Imperial Majesty, which treated of the subject of colonization, and that the said law was then read to said John Heath alias Juan Gid, and that he, being fully informed thereof, made a new application praying that by virtue of the law and his privilege the grant be made to him for an hacienda on the same tract that he had applied for, and so forth; all of which will more fully appear by the copy of the record of the town council of El Paso, dated April 3rd, 1823, a translation of which is herewith filed, marked "A," and made a part of this petition.

Your petitioners further allege that said Juan Gid presented his said petition to the said ayuntamiento, which seems to bear date on the seventh day of March, A. D. 1823, instead of the third day of March, but the same is attached to the official copy of said record of the proceedings of said ayuntamiento before referred to, in which said Gid represented that in December of the year preceding he had laid before the ayuntamiento, the predecessor of the one which he then addressed, his petition for said grant, and that the same had been sustained in all of its parts and forwarded by the said ayuntamiento to His Imperial Majesty under and by virtue of authority conferred upon them by the law of colonization, and that he had received no reply to the same; that under the act of the organic junta of the Empire of January the third, eighteen hundred and twenty-two, he applied *de novo*, repeating his prayer, with the addition thereto that he proposed to bring to the settlement of the land of the Bracito which he asked to be granted to him thirty families of Catholic Christians, among them mechanics, blacksmiths, armorers, silversmiths, carpenters, tailors, shoemakers, saddlers, archi-

tects, mathematicians, chemists, mineralogists, surgeons, and doctors, and to establish a hospital with the accompanying drug store, the same to be adequately stocked, together with necessary instruments for any operation, and also to establish a warehouse, stocked with all kinds of goods, to sell at wholesale, and to introduce the necessary machines for the manufacture of woollen and cotton cloths and another for the manufacture of powder, and proposing to do other things as in his said petition stated; a copy of which said petition, translated from the Spanish, is herewith filed, marked
4 Exhibit B, and made a part of this petition.

That in said petition he represented that in order to establish the said machinery, cultivate the land, and graze the live stock and promote other outdoor interests it was indispensable that the land be large enough to meet the requirements thereof, and that it should be at least enough for farms, and that it should be upon both sides of the river—that is, on both banks at the Bracito; that such settlement until time would permit the realization of the other calculations should be annexed to the parish of this jurisdiction; that the pasturage and woods should be used in common with the same privileges as other persons of that jurisdiction, and that no prejudice should be occasioned to the planting grounds, and that said John Heath alias Juan Gid, the petitioner, should be designated as the person for the distribution of the said land and to be respected as the legal justice for the said families; thereupon that he, having united himself with his brethren, the faithful people of the Empire, and being a peaceable citizen, in order to carry out the said colonization law, prayed that the people of the jurisdiction be informed of his petition, in order that those who chose to do so might agree and regulate themselves as they might deem right and proper, and he thereupon asked and prayed the said ayuntamiento to accede to his prayer; all of which will more fully appear by reference to the said copy of the translation from Spanish of the said petition, marked "B," and filed herewith as part of this petition.

That on the said seventh day of April, A. D. 1823, an order was made in the ayuntamiento, at the town hall of El Paso aforesaid, reciting that the said petition had been presented, and that the same was granted by that body upon the terms agreed upon that day, which being made known to Juan Gid he agreed to the same, and that the same should be published at that place on Sunday, the thirteenth of that month, for the purposes indicated; a copy of which said order and entry, translated from Spanish into English, marked Exhibit C, is filed herewith and made a part of this petition.

That another entry and order was thereafter made by the said ayuntamiento, at the said town of El Paso, on the thirteenth day of the month of April, 1823, in which it was recited that, being assembled at the hall of the town council with a large attendance of the people who had been called together by the customary previous notice, the petition of the said Juan Gid and the actions
5 thereon were publicly read, and the people having heard the same and being asked if they were satisfied with the new residents who intended to locate they answered in the affirmative,

manifesting satisfaction and no opposition; thereupon it was decided that upon the sixteenth day of that month, in pursuance of the said action, certain parties mentioned in said order, being the alcalde of the second election, the first alderman, the corporation attorney, and the corporation secretary, should go with the petitioner, Juan Gid, otherwise called John Heath, to the place Bracito for the purpose of executing the survey and carrying out the directions of the ayuntamiento under the decree of January the third of that year concerning the colonization; a copy of which said order or record, translated from Spanish to English, is herewith filed and made a part of this petition, marked Exhibit D, the same having been signed, as represented therein, by two alcaldes of the said jurisdiction and the secretary of the town council.

That afterwards, at the town hall of El Paso, on the fifteenth day of April, A. D. 1823, one Agapito Abo represented to the said town council or ayuntamiento that the fields and mills which the new settlers proposed to establish might in a few years be injurious to the old settlers of the entire jurisdiction on account of the water being cut off and consumed, so that it could not reach the other fields in the abundance desired, and after discussion of the same the said Juan Gid was called, who stated that should a scarcity of water occur it was understood by himself and the families with him that they would be governed by the laws of the Empire and by the regulations of the ayuntamientos, whose duty it was to see the laws properly distributed, and it was thereupon resolved by the town council or ayuntamiento to continue the execution of the decree of the thirteenth of that month made in compliance with the first action of the said ayuntamiento, a copy of which said order, translated into English, is herewith filed, marked Exhibit E, and made a part of this petition.

That on the said thirteenth day of April, A. D. 1823, the papers in the said application by said Juan Gid for said tract of land were turned over to the said parties directed to make said survey and give said possession, a copy of the order doing so, translated into English, being herewith filed, marked Exhibit F, and made a part of this petition.

6 That afterwards, on the seventeenth day of April, A. D. 1823, the commission appointed by the decrees of said ayuntamiento, consisting of four individuals, for the purpose of executing the papers in the case, having accepted the charge, proceeded to the place, where, in accordance with instructions, taking the head of the Bracito acequia for the central point of the estate to be given in possession to said Juan Gid, he, said Gid, in sign of possession, with an axe cut the bark of two cottonwood trees and where the wood of the trees was exposed wrote thereon "Hazda. do Dn. Juan Gid" and the year on both trees. The commission being then present as well as said Juan Gid, they appointed two surveyors, who promised to perform with fidelity the duties of their appointment. They were furnished with and received an iron chain in good condition, which, being measured, contained eleven varas of three geometric feet, as required by the colonization law; that immediately thereafter the

first survey was commenced, about one o'clock in the afternoon, towards the north. Having ascertained the point of commencement with perfect reliability, the same having been determined by an Anglo-American mathematician, who took the courses with a compass, concluding the measure at four o'clock on the same evening upon a hill, it being in line, a landmark, a cross, was placed, at the foot of which Juan Gid buried a stone with his name and the date written thereon, and which stone was acknowledged by him to be his legal boundary and to be the full measurement of two and a half leagues of five thousand varas from the center. Turning towards the east, the survey was commenced about three o'clock in the afternoon, using the compass for taking an air line, as there was no water observed on the course that might be desirable for a settlement or a ranch, and it was estimated that the two and a half leagues was reached upon a hill called La Cueva, in the Organ mountains. Then, taking up the survey at about half past four in the evening from the landmark, a cross, and running west, it was continued until sundown, passing on the line the road going to the Salt river, and, descending a ridge, a league and three cordels on one hundred and ten varas is completed. At sunrise the survey was again continued until completed at two and a half leagues, which was terminated upon a hill belonging to the Roblero mountains, between a black mountain on the left and a red one on the right, and with the same formality as with the other landmark the corner was placed at this point.

7 At about twelve o'clock the commission, the party interested, and the surveyors returned to the central point of said land, where about four o'clock p. m. the survey was taken up and run south, continuing the survey of the land until sunset, where a league and three cordels of one hundred and ten varas was finished. At sunrise the survey was continued until the two and a half leagues was completed, which was done in a small valley running up from the river towards the prairie below the Mesilla and opposite the Ochoa *cluffs*, where a landmark, a cross, was placed with the same formalities as the other landmarks, and, the survey being continued west from the line south with only the compass, the same was extended to where the two and a half leagues reached for the same reasons as given for the line run eastward to La Cueva of the Organ mountains, the line being completed at half past nine o'clock a. m. They then ran eastward from the termination of the line, running south. At about ten o'clock of the same day they reached the copper road, nineteen cordels of 110 varas, and up to the river 59 varas, where at midday they suspended, after which they resumed about two o'clock p. m. and continued until the two and a half leagues were finished, which was upon a hill lying to the right of the Trujillo salt lakes. Somewhat in advance of these, and opposite the last ridge of the El Paso mountains, called the Puer a de las Alamitas, and in line with the watering place called Las Crucitas, where was placed the corner landmark with the usual formality, with which proceeding the survey, with the varas of three geometrical feet, was concluded; whereupon the alcalde commis-

sioned inquired in legal form of the surveyors whether they had proceeded in the legal manner that they promised to observe upon running the first line they surveyed of that tract, and they replied that they had so acted and had no doubt and rested under no responsibility. Thereupon the party interested, Juan Gid, was asked whether he was satisfied with the whole survey made of the land, into full possession of which he was to enter under the colonization laws, and he replied that as he had witnesses — the formality that was observed throughout the execution of the survey of his land he was in all respects satisfied. With that understanding, and no claim being made to suspend the carrying out of the proceedings, the commission thereupon placed the said Juan Gid in lawful possession of the said land, informing him that the cultivable land he had upon the tract was the greater part of the prairie on the river
8 and that that land he should not use except for the cultivation of the edible grain and for the production of the necessaries for his agricultural business, and that the land granted him outside of the said river pra-rie was deemed sufficient for raising all kinds of live stock, charging him also that he should convey all the water he might use for the running of machinery he proposed to erect, as well as all other water, to the main channel, so that neither the city of El Paso nor the vicinage of which it was the seat should in any manner be injured. They then informed the said Gid that the object for which they had been commissioned was concluded. They reduced their proceedings to writing and the same was signed by the alcalde, Jose Morales, the four commissioners, and one of the surveyors. They then reported the same on the twenty-first day of April, 1823, to the said ayuntamiento. A copy of their proceedings, so reduced to writing, translated into English, is herewith filed, marked Exhibit G, and made a part of this petition, together with a copy of the record made as to the report of the same.

That afterwards, to wit, on the twenty-second day of April, A. D. 1823, proceedings were had by the ayuntamiento in the town hall of El Paso, in which they recited the receipt of the report of the said commission as to the execution of the survey that was to be made of the Bracito tract to be five leagues on each course, the whole comprising an hacienda conformably with article five of the colonization law, and which tract, as stated, was granted to said Juan Gid for settlement, as set forth, and he agreeing to what was done in the premises in all respects by the commission, the same was reduced to writing; a copy of which said order, translated into English, is herewith filed, marked Exhibit H, and made a part of this petition.

Your petitioner- further states that the measurements used were based upon the vara, composed of three geometrical feet, in making said survey, and not of thirty-three inches, and that the land in question comprises a tract of land of twenty-five square leagues of five thousand varas each, each vara being three feet, with the center of said tract at the head of the Bracito acequia, as set out in the papers before referred to, and extended two and a half leagues from said center to each cardinal point of the compass; that said land is

situate in the present county of Donna Ana, in the Territory of New Mexico.

That afterwards, on the twenty-third day of April, A. D.
9 1823, the said Juan Gid presented to the said ayuntamiento a map or plat of said land as surveyed, drawn by Guillermo Box, a mathematician, showing the courses according to the survey which was executed of the Bracito tract, which appearing to the ayuntamiento it was annexed to the papers for its clearness and exactness, and a copy is marked Ex. "O" and made a part of this petition.

Afterwards, to wit, on the twenty-fifth day of April, 1823, an order was made by the ayuntamiento to annex to the papers in reference to the said grant the resolution of that body passed on the third of that month conerning the grant to Juan Gid, which is the paper herewith filed, marked Exhibit A, and afterwards, on the day last mentioned, the said ayuntamiento made an order that, it being considered by the ayuntamiento that that case was concluded in which the tract of the Bracito was granted for settlement to Juan Gid, an Anglo-American of the United States, the fee on the same should be assessed in accordance with the tariff governing the ayuntamiento, by its secretary, that Gid might be advised of the fees he should pay for what had been done in the case, and it also provided the original of said papers should be filed for perpetual evidence, and that by the first mail a certified copy thereof should be forwarded to the governor of the province for his information, and a like copy to the party interested for his security; a copy of which said order is filed herewith, marked Exhibit I; all of which said papers are included in one general exhibit herewith filed, marked Exhibit K, to which is attached the certificate made by the secretary of the ayuntamiento; that the same are a copy from the original papers, drawn up at the request of Juan Gid in the grant to him for settlement of the Bracito tract of land, under the colonization laws, together with other documents elsewhere referred to, and that the original thereof remained duly on file, to which he certified.

The said Exhibit K is a correct translation of the said copies which were forwarded to the governor of the province of New Mexico, and which said copy so forwarded to him has ever since remained on file among the archives of the Territory of New Mexico and is now on file as one of the original papers belonging to the archives in the office of the surveyor general of the Territory of New Mexico; to which reference is hereby made for a more specific understanding of the same. A correct copy of the same in Spanish is also herewith filed, marked Exhibit L, and made a part of this petition.

10 Petitioners allege that the said Juan Gid complied with all the conditions and requirements of said grant and the laws under which it was made, so far as he was required to do by law and the acts of the grantor.

Petitioners further show that by virtue of the proceedings above recited and mentioned the grant to said Juan Gid became an abso-

lute and perfect grant, and the said Juan Gid obtained a perfect title to said land, and that your petitioners, as his heirs, descendants, and legal representatives of his heirs and descendants, have become and are the owners in fee of said lands and entitled to the same as an absolute and perfect grant and are entitled to so hold and possess the same.

Petitioners further state that there are three settlements either wholly or in part within the limits of said grant, one being the settlement known as the Doña Ana Bend colony, another being the settlement known as the Mesilla colony, and the other being the Hugh Stevenson tract of land, so called; that the said settlements comprise two or three thousand people, the names of said settlers constituting them being to your petitioners unknown, and they being also too numerous to mention herein, your petitioners being all residents beyond the limits of this Territory and not being familiar with the names of the persons residing within the limits of said tracts of land, and that they are therefore unable to give the names of any of the parties so residing within the said limits; and petitioners are informed that some other supposed grants or concessions have been made by the United States to individuals unknown to petitioners, which grants of land petitioners cannot now specify or describe nor give the names of the parties to whom they were made, and petitioners therefore pray that proper notice may be given to such of them as this court shall direct and in the manner this court may direct.

This said claim of petitioners to said lands has never been confirmed, considered, or acted upon by Congress or the authorities of the United States or heretofore submitted to any authorities of the United States or to any authorities constituted by law for the adjustment of land titles within the limits of said Territory of New Mexico so acquired by the United States, and by them has not been reported on unfavorably or recommended for confirmation or authorized to be surveyed; but the protocol of the original papers making said grant has always been preserved in the archives at Santa Fé, Territory of New Mexico, and reported by the
11 surveyor general of said Territory within recent years to the United States General Land Office, at Washington, as document No. 505, relating to Mexican and Spanish land grants, in archive No. 410.

Petitioners further state that said Juan Gid, alias Dr. John Heath, was a Roman Catholic and professed the Roman Catholic religion, the only religion of the country of Mexico, "having united himself with his brethren, the faithful people of the Empire."

And petitioners further file map heretofore marked Exhibit "O" and included in the grant papers and made a part of this petition as being a correct plat of the land in dispute.

Petitioners therefore pray that this their petition be considered by this honorable court, and that the validity of said grant of lands so made as aforesaid be enquired into and decided, and that said tract, with the boundaries hereinbefore set forth, be confirmed unto the

plaintiffs, their heirs and assigns forever, and for such other and general relief as to this honorable court may seem meet and proper.

And petitioners will ever pray.

(Signed) J. B. CESSNA,
Attorney for Petitioners.

Copy.

12 And be it further remembered that afterwards, to wit, on the 10th day of March, A. D. 1893, the same being the third day of the March term, A. D. 1893, the following proceedings were had in the said cause, to wit:

J. B. CESNA *et al.*
vs.
UNITED STATES.

Come now the petitioners, by J. B. Cesna, Esq., and the defendant, by Matt. G. Reynolds, Esq., United States attorney, and said petitioners, by their said attorney, moved the court that service of summons be made upon Numa Raymond, John A. Barncastle, Josefa Barncastle, Manuel Banegas, Thomas J. Bull, and many other unknown persons, parties defendant in the above-entitled cause.

Whereupon the court considered the names of the proposed parties defendant were not properly named, and denied the motion.

13 And be it further remembered that afterwards, to wit, on the tenth day of March, A. D. 1893, being the third day of the March term, A. D. 1893, the following further proceedings were had in the said court, to wit:

J. B. CESSNA *et al.*
vs.
UNITED STATES.

Come now the petitioners, by their attorneys, J. B. Cessna, Esq., and the defendants, by Matt. G. Reynolds, Esq., United States attorney. Upon the filing and reading the petition of plaintiffs in the above-entitled cause and upon the representations in said petition, as well as of counsel for plaintiffs, that many of the defendants herein are unknown and to- numerous to mention in said petition and too numerous for personal service of the process of this court, and upon the filing and reading of a notice of the pendency of this suit proposed by plaintiffs to be given by publication, the court, being sufficiently advised in the premises, hereby orders that service of process upon the defendants herein may be made by publication of said notice herein filed in both English and Spanish for two successive weekly insertions in some newspapers printed and circulated in the county in which the land involved in this suit is situate, or in some newspaper or newspapers near said land and having general circulation in that county, and that proof of such publication of notice shall be made by the affidavit of the publisher or editor of said newspaper or newspapers in the manner now provided by law for district courts of this Territory.

14 Be it further remembered that afterwards, to wit, on the 28th day of April, A. D. 1893, an answer was filed in said cause in the office of said clerk; which said answer is in the words and figures following, to wit:

15 UNITED STATES OF AMERICA, } *ss:*
Territory of New Mexico, }

In the matter of private land claim of John G. Heath (Juan Gid).

In the United States Court of Private Land Claims, Sitting at Santa Fé, New Mexico.

J. B. CESSNA *et al.*
vs.
THE UNITED STATES OF AMERICA and THE UNKNOWN OWNERS OF the Dona Ana Bend Colony, Mesilla Colony, and Bracito Grants.

F. C. Gay, M. Reynolds, C. S. Cross, and J. L. Stubbs, by their attorney, Samuel H. Baker, now come and answer the plaintiffs' petition in the above-entitled action, and, answering, say—

That they are the owners of that portion of the lands heretofore granted to the Mesilla colony which is described as follows:

From corner No. 1, in center of old river bed, thence corner No. 7 of property of William Steele bears N. 18° 35′ W. 561 ft.; thence from corner No. 1, meandering center of old river bed, S. 30° 10′ E. 900 ft. to corner No. 2; thence S. 20° W. 648 ft. to corner No. 3; thence S. 61° W. 550 ft. to corner No. 4; thence S. 82° 24′ W. 515 ft. to corner No. 5; thence N. 63° 05′ W. 1,504 ft. to corner No. 6; thence S. 88° 30′ W. 564 — to corner No. 7; thence S. 47° 04′ W. 1,044.5 ft. to corner No. 8; thence S. 50° 47′ E. 688 ft. to corner No. 9; thence across old river bed S. 20° 55′ W. 300 ft. to corner No. 10, on right bank of old river bed; thence S. 40° 10′ W. 909 ft. to corner No. 11; thence S. E. corner of old house is N. 60° W. 25 ft. distant; thence S. 75° 50′ W. 150 ft. to corner No. 12; thence S. 49° 16′ W. 410.8 ft. to corner No. 13, on east side public road running from La Mesilla to Picachio and about 10 ft. southwest from S. W. corner of bridge; thence up E. side of said road N. 30° 03′ W. 2,722.3 ft. to corner No. 14 (M); thence continuing up E. side *said* of said road N. 34° 20′ W. 1,562.5 ft. to corner No. 15 (S); thence N. 65° 54′ E. 1,285 ft. to corner No. 16 (K); thence proceeding down center of old river bed N. 25° 04′ E. 726 ft. to corner No. 17 (J); thence N. 44° 58′ E. 710 ft. to corner No. 18 (T); thence S.

16 86° 30′ E. 700 ft. to corner No. 19 (H); thence S. 45° 58′ E. 653 ft. to corner No. 20 (G); thence S. 62° 52′ E. 1,000 ft. to corner No. 21 (F); thence N. 85° 24′ E. 302 ft. to corner No. 22 (E); thence N. 49° 33′ E. 900 ft. to corner No. 23 (D); thence W. 67° 18′ E. 837.5 ft. to corner No. 24 (C); thence S. 72° 24′ E. 285.8 ft. to corner No. 25 (B); thence S. 40° 06′ E. 289 ft. to corner No. 26 (A), same as corner No. 7 of property of William Steele; thence S. 18° 35′ E. 561 ft. to corner No. 1, the place of beginning, all in the

county of Donna Ana, Territory of New Mexico; which tract is known as the Duhalde tract and embraces 303 acres, more or less, in the said the Mesilla Colony grant by good and indefeasible title in fee-simple.

And that the said defendants do deny each and every material allegation made in plaintiffs' petition aforesaid, and, on the contrary, allege that they, the defendants, are the owners of the above-described land.

Wherefore defendants pray for judgment of the honorable court confirming to them the title of the above-described tract of land and for their costs in this action, and for such other relief as to the court may seem just and to equity may appertain.

SAMUEL H. BAKER,
Attorney for Defendants Gay, Reynolds, Cross, and Stubbs, of the Mesilla Colony.

17 Be it further remembered that afterwards, to wit, on the twentieth day of June, A. D. 1893, a demurrer was filed in the said cause in the office of said clerk in the words and figures following:

18 In the Court of Private Land Claims, Territory of New Mexico.

JOHN B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

The demurrer of The United States and Numa Raymond, John D. Barncastle and Josefa Barncastle, his wife, and Manuel Banegas, defendants, to the petition of the said John B. Cessna and others, claimants.

These defendants, by protestation, not confessing all or any of the matters and things in the claimants' petition contained to be true in manner and form as the same are therein set forth and alleged, do demur to said petition and for cause of demurrer show the following:

1. That the claimants have not in and by their said petition made or stated such a case as entitles them in this honorable court to any relief as to the matters contained in said petition or any of such matters.

2. That said petition sets up and pleads a mere conclusion of law instead of the facts from which such conclusion might be drawn when it alleges that said Juan Gid complied with all the conditions and requirements of said grant and the laws under which it was made so far as he was required to do by law and the acts of the grantor.

3. That said petition fails to show that Juan Gid ever brought to the settlement of the land alleged to be granted thirty or any other number of families of Christian Catholics, as he was required to do

by the terms of his alleged grant, or that he ever did any of the other things required of him by the terms of said alleged grant.

4. That said petition sets up an alleged grant by the ayuntamiento of El Paso under the colonization law of January 3, 1823, but fails to show that said ayuntamiento acted in conformity with the orders or instructions of the government, or that any such
19 orders or instructions had been made by the government.

5. That said petition lacks certainty of time because it does not show when Juan Gid complied with the conditions and requirements of said grant and the laws under which it was made.

6. That said petition and the exhibits filed therewith and made a part thereof show that said Juan Gid asked for and the ayuntamiento intended to give one hacienda, while the land claimed is five haciendas in extent.

7. That said petition fails to show that the ayuntamiento had any authority to increase the amount of land granted above the quantity specified in article eight of said colonization law.

8. That said petition fails to show that the said Juan Gid cultivated the land alleged to have been granted or any portion thereof within two years after the date of the concession.

9. That the exhibits which are filed with and made a part of the said petition show that the said Juan Gid should have ownership of only the lands which could be used for farming, manufactures, machinery, &c., and of no other lands, while the petition claims twenty-five square leagues of land, obviously including land of other kinds.

10. That said petition fails to show that said Juan Gid ever made any claim to the land or had any possession of it or exercised any dominion over it at any time after April 16, 1823.

11. That said exhibits show that said alleged grant was made with a reservation as to the superior determination of the government, to which a report was to be made, but shows nothing as to what such superior determination may have been, while the failure of Juan Gid to claim, possess, or exercise dominion over the
20 land after April, 1823, raises a presumption that such superior determination must have been adverse.

12. That said petition is in other respects uncertain, informal, and insufficient.

Wherefore the said defendants pray judgment of this honorable court as to whether they should be required to make any other answer to the said petition, and that said petition may be dismissed.

MATT. G. REYNOLDS, *U. S. Att'y.*
S. B. NEWCOMB,
Solicitor for Defendants.
F. W. CLANCY,
Of Counsel for Def'ts.

I, the undersigned, Frank W. Clancy, of counsel for defendants named in the foregoing demurrer, do hereby certify that in my opinion the said demurrer is well founded in point of law.

FRANK W. CLANCY.

TERRITORY OF NEW MEXICO, }
County of Donna Ana. }

Numa Reymond, being duly sworn, upon his oath says that he is one of the defendants named in the foregoing demurrer, and that the said demurrer is not interposed for delay.

NUMA REYMOND.

Subscribed and sworn to before me on this 5th day of June, 1893.

{ Seal of Morris Freudenthal, Notary Public, Las Cruces, Donna Ana Co., N. M. }

MORRIS FREUDENTHAL,
Notary Public, Donna Ana Co., New Mexico.

21 And be it further remembered that afterwards, to wit, on the eighteenth day of July, A. D. 1893, being the first day of July term, A. D. 1893, the following further proceedings were had in the said court, to wit:

J. B. CESNA }
vs.
UNITED STATES. }

The above-entitled cause was set for trial on the 21st inst.

22 And be it further remembered that afterwards, to wit, on the twenty-eight day of July, A. D. 1893, being the ninth day of the July term, A. D. 1893, the following further proceedings were had in the said court, to wit:

J. B. CESNA *et al.* }
vs.
UNITED STATES. }

The above-entitled cause having come up for argument on the demurrer of the United States, there appeared Matt. G. Reynolds, Esq., United States attorney; F. W. Clancy, attorney of the Doña Ana Bend Colony grant; J. B. Cesna, attorney for plaintiffs in the cause, and Henry L. Waldo, Esq., representing the Rio Grande Land Co. This demurrer was filed by F. W. Clancy, in behalf of the Doña Ana Bend Colony grant, and joined in by the United States, through its attorney, Matt. G. Reynolds, Esq., and by the Rio Grande Land Company, represented by Henry L. Waldo, Esq., F. B. Catron, Esq., associated with J. B. Cesna in defending the grant title.

After full arguments by counsel the court, wishing to take the matter at issue under consideration and not being sufficiently advised, took the same under advisement.

23 & 24 Be it further remembered that afterwards, to wit, on the 31st of July, A. D. 1893, the same being the eleventh day of the July term, A. D. 1893, the following further proceedings were had in the said court, to wit:

J. B. CESSNA *et al.*
vs.
THE UNITED STATES.

In the above-entitled cause the court, having had the demurrer filed on June 20, 1893, herein under advisement and being fully advised in the premises, this day overruled the same, and it is so ordered. The above demurrer was argued on the 28th inst.

25 Be it further remembered that afterwards, to wit, on February 16th, A. D. 1894, an answer was filed in said cause in the office of said clerk; which said answer is in the words and figures as follows:

26 UNITED STATES OF AMERICA,
Territory of New Mexico.

In the Court of Private Land Claims.

J. B. CESSNA *et al.*, Petitioners,
and
THE UNITED STATES OF AMERICA and THE UNKNOWN OWNERS OF the Doña Ana Bend Colony, Mesilla Colony, and Bracito Grant, Respondents.

Answer.

The joint and several answers of The Rio Grande Land Company and The New Mexico Town Company, corporations organized under the laws of the Territory of New Mexico, the respondents herein, to the petition of the said petitioners.

These respondents reserving to themselves all right of exception to the said petition, for answer thereto severally say that they, or any, or either of them to the knowledge or belief of the others or other of them do not know, and have never been informed, save by the said petitioners' petition, and cannot set forth as to their belief or otherwise whether one John Heath, alias Juan Gid, addressed a petition to the Emperor of Mexico, through the office of the secretary of the State of Mexico, requesting a grant of the lands and properties in the said petition described; or, whether on the third day of April, A. D. 1823, the said John Heath, alias Juan Gid, applied to the ayuntamiento of El Paso in the present State of Chihuahua in Mexico, to know what had been done with his said petition which he had forwarded to the said Emperor through the former ayuntamiento of said town; or whether the said John Heath, afterwards, on the third or seventh of March, A. D. 1823, applied, *de novo*, to said ayuntamiento, for the grant of the said tract of land; or, whether, on the seventh day of April, A. D. 1823, an order was made in the said ayuntamiento at the town hall of El Paso, aforesaid, reciting that the said petition had been forwarded, and that the same was granted by that body upon the terms agreed upon that day, which being made known to Juan Gid, he agreed to the same, and that the same should be published at that place on

Sunday, the thirteenth of that month, for the purpose indicated; or, whether another entry and order was made thereafter by the said ayuntamiento at the said town of El Paso, on April 13th, 1823, in which it was recited that being assembled at the hall of the town council with a large attendance of the people, who had been called together by the customary previous notice, the petition of said Juan Gid and the actions thereon were publicly read, and the people having heard the same, and being asked if they were satisfied with the new resi-
27 dents who intended to locate, they answered in the affirmative, whereupon it was decided that upon the sixteenth day of that month certain parties mentioned in said order, should go with the petitioner, Juan Gid, to the place "Bracito," for the purpose of executing the survey, and carrying out the directions of the ayuntamiento under the decree of January 3d, 1823, concerning colonization; or, whether on the said April 13th, 1823, the papers in the said application by said Juan Gid for said tract of land were turned over to the said parties directed to make said survey, and give said possession; or, whether afterwards, on April 17th, A. D. 1823, the commission appointed by the decree of the said ayuntamiento, consisting of four individuals, for the purpose of executing the papers in the case, having accepted the charge, proceeded to the place, where, in accordance with instructions they surveyed the tract of land in the manner and form as in said petitioners' petition herein is fully described and set forth, and said survey having been completed, the party interested, the said Juan Gid, was asked whether he was satisfied with the whole survey made of the land into full possession of which he was to enter, under the colonization law; and he replied that as he had witnessed the formality that was observed throughout the execution of the survey of his land, he was in all respects satisfied; or, whether, the said commission thereupon placed the said Juan Gid in lawful possession of the said land, and reduced their proceedings to writing, and the same was signed by the alcalde, the four commissioners and one of the surveyors; and then reported the same, on April 21st, 1823, to the said ayuntamiento, or whether, afterwards, to wit, on April 22d, A. D. 1823, proceedings were had by the ayuntamiento in the town hall of El Paso, in which they recited the receipt of the report of the said commission, as to the execution of the survey that was to be made of the Bracito tract, to be five leagues on each course, the whole comprising an hacienda, conformably with article 5 of the colonization law; and which tract as stated was granted to said Juan Gid for settlement, as set forth, and he agreeing to what was done in the premises, in all respects, by the commission, the same was reduced to writing; or whether afterwards, on April 23d, 1823, the said Juan Gid presented to the said ayuntamiento a map or plat of the
28 land surveyed, drawn by Guillermo Box, showing the courses, according to the survey which was executed of the Bracito tract, which appearing to the ayuntamiento it was annexed to the papers; or whether, afterwards, to wit, on April 25th, 1823, an order was made by the ayuntamiento to annex to the papers in reference

to the said grant the resolution of that body passed on the third of that month, concerning the grant to Juan Gid, or whether, on the day last mentioned, the said ayuntamiento made a further order that that case was concluded, in which the tract of the Bracito was granted for settlement to Juan Gid, an Anglo-American of the United States, the fee on the same should be assessed in accordance with the tariff governing the ayuntamiento; and that the original of the said papers should be filed for perpetual evidence, and that by the first mail a certified copy thereof should be forwarded to the governor of the province for his information, and a like copy to the party interested for his security; or whether the said Juan Gid complied with all of the conditions and requirements of said grant and the laws under which it was made, so far as was required to do by law, and the acts of the grantor.

And these respondents further jointly and severally answering, deny that by virtue of the proceedings of the ayuntami-nto of El Paso and of the said Juan Gid, that any lawful title to the said tract of land in the said petition described vested in the said Juan Gid, or that the said Juan Gid thereby obtained an absolute and perfect title to the said tract of land, and further answering say that, under and by virtue of the provisions of the law of January 4th, 1823, or of the provisions of any other law then in force, the ayuntamiento of El Paso had no power or authority to make a grant of land to said Juan Gid in manner and form set forth in the petitioners' petition; and that the said constituent congress of Mexico decreed, on April 8th, 1823, that all acts of the preceding government, being the government by which the said colonization law of January 4th, 1823, was enacted, under the provisions of which the petitioners in their petition claim the said alleged grant to John Heath, or Juan Gid was made, from May 19th, 1822 to May 29th, 1823, were illegal, and subject to be revised, confirmed or revoked by the government then established; and that the said colonization law of Jan-
29 uary 4th, 1823, was afterwards, to wit, on April 11th, 1823, by the decree of the said congress, suspended until a new resolution on the subject, by reason whereof, all the proceedings of the said ayuntamiento of El Paso respecting the said alleged grant of land was illegal and void and of no effect.

And these respondents further, jointly and severally answering say, that they are informed, and believe, that whatever right, title or claim the said Juan Gid may have had or become seized of, by virtue of the said proceedings of the said ayuntamiento of El Paso respecting the said tract of land, in the said petitioners' petition more fully described and set forth, was annulled and forfeited by the said Juan Gid, by reason of his having, some time during the year 1824, abandoned the said tract of land, and left and removed from the Republic of Mexico; and that by reason thereof, whatever right, title, interest or claim the said Juan Gid may have had, or acquired, by reason of the said proceedings of the said ayuntamiento, in the said tract of land, was by virtue of the laws and ordinances of the Republic of Mexico, annulled and forfeited to the government of the Republic, and the said tract of land thereby became

vacant or public land and was subject to be regranted by the proper and lawful authorities.

And these respondents further, jointly and severally answering say, that the petitioners herein in their said petition set up and claim title to the said tract or grant of land, in the said petition more fully described, as the heirs and legal representatives of the said John Heath, or Juan Gid, deceased; and that these respondents are informed, and believed to be true, that the said John Heath, or Juan Gid was, at the time of his death, domiciliated in the United States of America, and a citizen of that Republic; and that at that time the heirs of the said John Heath, or Juan Gid were domiciliated in the said United States of America and citizens of that Republic; that the said heirs being so as aforesaid domiciliated and citizens of the United States under and by virtue of the laws of Spain or of the Indies, or of the law of the junta instituente of January 4th, 1823, or of the laws of the Republic of Mexico, in such case made and provided, could acquire, by inheritance, no right, title, or interest in or to the land, so as aforesaid claimed by the petitioners to have been granted to their ancestor, the said John Heath or Juan Gid.

30 And these respondents, jointly and severally, further answering say that heretofore, some time during the year 1822 or 1823 a grant of land was made to one Juan Antonio Garcia, which said tract of land is now situated in Donna Ana county, in the Territory of New Mexico, and is bounded and described as follows, "Beginning at a point on the Rio Grande known as the mouth of the Bracito acequia, and running south along the said river a distance of three leagues to a lake known as the Trujillo lake, and thence extending back towards the east from said river to range of sandy hills, varying in distance from two to four and a half miles; thence in a northerly direction along the said sand hills, varying from two to four and a half miles from the river to a point due east of the place of beginning, and thence to the place of beginning;" that the said grant or tract of land was confirmed to the heirs and legal represent-s of the said Garcia by the act of Congress of the United States entitled, "An act to confirm certain land claims in the Territory of New Mexico" approved June 21st, 1860; and duly surveyed by the surveyor general of New Mexico, as will more fully appear by reference to the field-notes and plat of said survey which are filed and of record in the office of said surveyor general, said tract comprising a part of township 24 and 25 south, ranges 2 and 3, east of the principal base and meridian lines in New Mexico, these respondents further say, that the said grant, and the said possession so as aforesaid given of said tract of land, invested the said Garcia with a title in full possession, that is, in fee-simple, to the said tract of land; and that he and his heirs and legal representatives, have remained in the possession of the same from that day to the present time; and that these respondents hold and claim title and possession of and to a part of the said tract of land by *mense* conveyances from the original grantee, his heirs and legal representatives; and that the said tract of land is included within the outboundaries of the tract of

land which the petitioners in their petition claim was granted to the said John Heath or Juan Gid.

And these respondents, jointly and severally, further answering says that, pursuant to the law of the Republic of Mexico of August 19th, 1848, and the colonization regulations as issued by the
31 supreme government of the State of Chihuahua on March 22d, 1851, enacted in pursuance thereof, one Guadalupe Miranda, commissioner general of the removal of Mexican families to the national territory, and the establishment of colonies, placed certain Mexican citizens in possession of a tract of land in the State of Chihuahua, now in the county of Donna Ana, in the Territory of New Mexico by the following boundaries and manner following, viz:

"I, Guadalupe Miranda, commissioner general for the removal of Mexican families to the national territory and the establishment of colonies, do certify that this fourth day of August, one thousand eight hundred and fifty-three, I proceeded to the Mesilla colony, on the right hand of the Rio Bravo del Norte, and in the name of the supreme powers of the nation and those of the State government, I have, for the commons of the same as a new colony, determined, designated and placed landmarks to two leagues of agricultural land extended along the bend, as the five thousand varas which the area should contain to square it cannot be obtained in the principal part thereof between the river and the drainings of the hills; and ascending to the mouth, it narrows until it joins the hills at the Picacho mountain; and two leagues on the mountains and plains for pasturing live stock, in accordance with article 2 of the regulations of May 22d, 1851, and in consideration of the large population this na-cent colony has, and to give it more advantages and conveniences, the citizens are required, and they are disposed to divide themselves into two communities as even as possible, one of them wherever it may be selected, and the other at the Picacho mesa, as they have already under cultivation all the arable lands, a circumstance that I have kept in view in granting them the extent of planting land the bend contains, which is embraced in the following measurements, and the two leagues for pasture land: Having designated yesterday, the third instant, the line that divides this colony of Mesilla, and that of Santo Tomas de Iturbide, in the presence of the authorities of both, and many others, the first landmark was established on the east near an arm of the river, about eight varas distant, where there are some small marked cotton trees, and on a small sand hill; from thence west, south of the Mesilla and north of the Santo Tomas colony, lines run with the cordel to a hill in front of the ruins of
32 a corral, called the Guerras corral, making five thousand varas on the hill, and the landmark was established continuing toward the north; on the west the measurement was made with the cordel on the slope or drainings of the hills, in a direct line toward the Picacho hill on the river side, and when it touches the hills; thence continuing the measurements along the margin of the river, it reached the Penasco Prieto hill, which is to the north of the small bend called the Apache ford, a little above the Picacho,

making 19,500 varas, returning to commence at the first point at the edge of the river of the colonies of Santo Tomas, and this of the Mesilla was fixed when the dividing line on the north from the small sand hill; thence to the north on the east, following the bank of the river in a direct line, in the direction of the Picacho, on the margin of the said river, where it reaches the hills, and following the bank very close to the Penasco Prieto, which is situated on the north of the small bend called the Apache Ford bend, making 20,000 varas, with which three measurements, the area of the cultivable was determined. From this point of the Penasco Prieto west, on the north over the hills, there *was* measured 5,000 varas, and a landmark was established on a hill near the dividing line; thence to the south on the west were measured 10,000 varas, which reach below the present plaza of Mesilla, the landmark was established in the plain; thence east on the south 5,000 varas were measured off, which reach to the drainings of the hills, and intersected the line of the arable lands, and in conformity with article 4 of said regulations, the lines having been designated by mounds of earth and some marked trees, the authorities being directed to establish the extreme boundaries of the admeasurement by placing mounds of stone and morter, to the end that lapse of time do not destroy them, that they may be always observed and respected as the metes and bounds of the commons."

Your respondents further say that the said possession, so as aforesaid given of said tract of land, invested the inhabitants of the said colony with a title in full possession, that is, in fee-simple, to the said tract of land; and that they, and their heirs and legal representatives, have remained in the possession of the same from that day to the present time; and that these respondents hold and claim title and possession of and to a part of the said tract of land by
33 mense conveyances from the original grantees, their heirs and legal representatives; and that the said tract of land lies and is included within the outboundaries of the tract of land which the petitioners in their petition claim was granted to the said John Heath or Juan Gid; and these respondents further say, that the heirs and legal representatives of the said original grantees of the said colony, some time in the year 1874 presented the same, pursuant to the provisions of the act of Congress in such case made and provided, to the surveyor general of New Mexico for confirmation; and that the said surveyor general on February 12th, 1874, recommended to the Congress of the United States that the title to the said tract of land *to* be confirmed to the inhabitants of the said Mesilla civil colony, and their legal representatives according to the boundaries set forth in the grant papers executed by the said Guadalupe Miranda, commissioner, August 4th, 1854.

And these respondents, jointly and severally, further answering say that, pursuant to the decree of the Republic of Mexico of August 19th, 1848, and the colonization regulations issued by the supreme government of the State of Chihuahua, on March 22, 1851, enacted in pursuance thereof, one Ramon Ortiz, commissioner general for the removal of Mexican families to the national territory, and the

establishment of civil colonies in the State of Chihuahua, placed certain Mexican citizens in possession of a tract of land in the said State, now in the county of Donna Ana in the Territory of New Mexico known as the "Civil Colony of Refugio." The Rio Grande river bounds said colony and grant of land on the east, and on the west it is bounded by a line running parallel with the general course of the said river, about a mile west of the top of the foothills or mesa bordering the valley of said Rio Grande river on its west bank.

Monuments of stones were placed at the corners of said grant, that is to say; one monument was placed immediately on the bank of said Rio Grande river, on its western side, and about the middle of the lands occupied by Estanislaucano Alvillar in the year 1873, that is, about midway on said land from north to south. Another monument was placed nearly west of said last-mentioned monument about a mile back of the top of the mesa lands, or foot-
34 hills. A line drawn from one of these monuments to the other is the northern boundary of said grant. Another monument was placed at the western boundary of said Rio Grande river, near a place known as "El Alto de los Cuarones," about four miles down said Rio Grande river from the first-mentioned monument, and another monument was placed nearly west of this last-mentioned monument, and about a mile west of the top of the foothills or mesas before described. A line drawn direct from one of these last-named monuments to the other one, constitutes the south boundary of the said grant. A line drawn between the two western monuments, from one to the other, and parallel to the general course of the said Rio Grande river, is the western boundary of said grant; and the said Rio Grande river, between the two monuments before described, on the bank of the said river, is the eastern boundary of said grant. Your respondents further say, that the said possession, so as aforesaid given of said tract of land, invested the inhabitants of the said colony with a title in full possession, that is, in fee simple, to the said tract of land; and that they, and their heirs and legal representatives, have remained in the possession of the same from that day until the present time; and these respondents hold and claim title and possession of and to a part of the said tract of land by *mense* conveyances from the original grantees, their heirs and legal representatives; and that the said tract of land lies and is included within the outboundaries of the tract of land which the petitioners in their said petition claim was granted to the said John Heath, or Juan Gid; and these respondents further say, that the heirs and legal representatives of the said original grantees of the said colony, some time during the year 1873, presented the same, pursuant to the provisions of the act of Congress in such case made and provided, to the surveyor general of New Mexico for confirmation; and that the said surveyor general, on May 18th, 1874, recommended to the Congress of the United States that the title to the said tract of land be confirmed to the inhabitants of the said Refugio civil colony, and their legal representatives according to the boundaries set forth in the record filed in his office.

And these defendants jointly and severally deny all and all
35 manner of unlawful combination and confederacy, wherewith they are by the said petition charged, without this, that there is any other matter, cause, or thing in the said petitioners' petition contained, material or necessary for these respondents to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these respondents; all which matters and things these respondents are ready and willing to swear, maintain, and prove as this honorable court shall direct, and humbly pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully *con*tained.

JAMES W. VROOM AND
RALPH E. TWITCHELL,
Solicitors for Respondents.

36 UNITED STATES OF AMERICA, } ss.:
Territory of New Mexico, }

Be it further remembered that afterwards, to wit, on the first day of March, A. D. 1895, a replication was filed in said cause in the office of said clerk; which said replication is in the words and figures following, to wit:

37 In the United States Court of Private Land Claims, Sitting at Santa Fé, New Mexico.

J. B. CESSNA *et al.* }
vs.
UNITED STATES *et al.* }

Replication.

The petitioners, reserving to themselves all right of exception to the answer of the defendants or respondents, reply as follows: They deny each and every allegation of new matter or pretended claim of title to any portion of said land covered by plaintiffs' petition, as set forth in respondents' answer.

And these petitioners further deny that by virtue of any legal proceedings whatever during the year 1822 or 1823, or any other time whatever, a grant of land was ever made by the Mexican government to Juan Antonio Garcio, as claimed in respondents' answer, and described as beginning at a point on the Rio Grand- river on the mouth of the Bracito acequio, etc., etc., and more particularly described in respondents' answer.

That said pretended grant was never made by any Mexican authority or authorities having, at the time, the right of authority to make grants of the public lands of the Republic of Mexico, and further allege that said land had been previously granted by Mexican authority to Juan Gid or Dr. John G. Heath, under which plaintiffs claim, whose right and title is superior to all others.

38 The petitioners deny *that* this supposed grant and confirmation by Congress of the United States June 21, 1860, as

claimed by respondents, and further deny that the said Garcio or his successors were ever invested in any manner with the legal or equitable title or any right or title whatever to the land they claim in their answer, or any portion thereof, being part of the land covered by plaintiffs' petition.

The petitioners say they have no knowledge as to whether the respondents are successors to Garcio or not, except what is stated in respondents' answer, and they deny the same and call for proof.

The petitioners further deny that by virtue of the proceedings set forth in respondents' answer, or that by virtue of any other proceedings whatever, the Messillo colony ever became legally, equitably, or lawfully invested with a title in fee or otherwise to any portions of said land described in plaintiffs' petition, said land as claimed by said respondents and other defendants being particularly described in their said answer, because said pretended grant was made without any right or legal authority to make grants of the public domain of the Republic of Mexico, and said pretended possession was without any legal authority; and, further, this said pretended grant to the said Messillo colony, as set up by the respondents, was wholly illegal and void and was made of land that had been previously granted and possession thereof given by the Mexican government to the said Juan Gid, under whom the plaintiff's claim title.

The petitioners say they have no knowledge as to whether the respondents are successors to Messillo colony or not, except what is stated in respondents' and*s*wer, and they deny the same and call for proof.

The petitioners further deny that by virtue of the proceedings set forth in respondents' answer, or that by virtue of any other proceedings whatever, the civil colony of Repugio ever became
39 legally, equitably, or lawfully invested with a title in fee or otherwise to any portion of said land described in plaintiffs' petition—said land, as claimed by said respondents and other defendants, being particularly described in their said answer—because said pretended grant was made without any right or legal authority to make grants of the public domain of the Republic of Mexico, and said pretended possession was without any legal authority; and, further, that said pretended grant to the said civil colony of Repugio, as set up by the respondents, was wholly illegal and void and was made of land that had been previously granted and possession thereof given by the Mexican government to the said Juan Gid, under whom the plaintiffs claim title.

The petitioners say they have no knowledge as to whether the respondents are successors to the civil colony of Repugio or not, except what is stated in respondents' answer, and they deny the same and call for proof.

All this the plaintiffs are ready to verify and pray may be inquired of by the country.

J. B. CESSNA,
Attorney for Petitioners.

40 Be it further remembered that afterwards, to wit, on the twentieth day of May, A. D. 1895, an answer was filed in the said cause in the office of the said clerk; which said answer is in the words and figures following:

41 UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, May Term of Court, 1895, Santa Fé, N. M.

J. B. CESSNA *et al.*, Plaintiffs,
vs.
UNITED STATES, Defendant. } Juan Gid or John Heath Grant.

Answer.

The United States, reserving to itself all right of exception to the said petition, and for its separate answer thereto, says it has no knowledge or belief and has never been informed, save by the petition of said petitioners, of the existence of said alleged claim or grant, or that the plaintiffs or one John Heath, alias Juan Gid, ever claimed any interest therein.

It has no knowledge or information and has never been informed as to whether John Heath, alias Juan Gid, addressed a petition to the Emperor of Mexico, through the office of the secretary of the State of Mexico, requesting a grant of the lands and properties in the said petition described; or whether, on the third day of April, A. D. 1823, the said John Heath, alias Juan Gid, applied to the ayuntamiento of El Paso, in the present State of Chihuahua, in Mexico, to know what had been done with his said petition which he had forwarded to the said Emperor through the former ayuntamiento of said town; or whether the said John Heath afterwards, on the third or seventh day of March, A. D. 1823, applied *de novo* to said ayuntamiento for the grant of the said tract of land; or whether, on the seventh day of April, A. D. 1823, an order was made *in* the said ayuntamiento, at the town hall of El Paso, afterwards reciting

42 that the said petition had been forwarded, and that the same was granted by that body upon the terms agreed upon that day, which being made known to Juan Gid, he agreed to the same, and that the same should be published at that place on Sunday, the thirteenth of that month, for the purpose indicated; or whether another entry and order was made thereafter by the said ayuntamiento at the said town of El Paso, on April 13, 1823, in which it was recited that being assembled at the hall of the town council with a large attendance of the people, who had been called together by the customary previous notice, the petition of said Juan Gid and the actions thereon were publicly read, and the people having heard the same and being asked if they were satisfied with the new residents who intended to locate, they answered in the affirmative, whereupon it was decided that upon the sixteenth day of that month certain parties mentioned in said order should go with the petitioner Juan Gid to the place "Bracito" for the purpose of executing the

survey and carrying out the directions of the ayuntamiento under the decree of January 3, 1823, concerning colonization; or whether, on the said April 13, 1823, the papers in the said application by said Juan Gid for said tract of land were turned over to the said parties directed to make said survey and give said possession, or whether afterwards, on April 17, A. D. 1823, the commission appointed by the decree of the said ayuntamiento, consisting of four individuals, for the purpose of executing the papers in the case, having accepted the charge, proceeded to the place, where, in accordance with instructions, they surveyed the tract of land in the manner and form as in said petitioners' petition herein is fully described and set forth, and, said survey having been completed, the party interested, the said Juan Gid, was asked whether he was satisfied with the whole survey made of the land into full possession of which he was to enter under the colonization law, and he replied that as he had witnessed the formality that was observed throughout the execution of the survey of his land he was in all respects satisfied; or whether the said commission thereupon placed the said Juan Gid in lawful possession of the said land, and reduced their proceedings to writing, and the same was signed by the alcalde, the four commissioners, and
43 one of the surveyors and then reported the same on April 21, 1823, to the said ayuntamiento, or whether afterwards, to wit, on April 22, A. D. 1823, proceedings were had by the ayuntamiento in the town hall of El Paso, in which they recited the receipt of the report of the Bracito tract to be five leagues on each course, the whole comprising an hacienda, conformably with article 5 of the colonization law, and which tract, as stated, was granted to said Juan Gid for settlement, as set forth, and he agreeing to what was done in the premises in all respects by the commission, the same was reduced to writing; or whether afterwards, on April 23, 1823, the said Juan Gid presented to the said ayuntamiento a map or plat of the land as surveyed, drawn by Guillermo Box, showing the courses according to the survey which was executed of the Bracito tract, which appearing to the ayuntamiento it was annexed to the papers; or whether afterwards, to wit, on April 25, 1823, an order was made by the ayuntamiento to annex to the papers in reference to the said grant the resolution of that body passed on the third of that month concerning the grant to Juan Gid; or whether on the day last mentioned the said ayuntamiento made a further order that — that case was concluded in which the tract of the Bracito was granted for settlement to Juan Gid, an Anglo-American of the United States, the fee on the same should be assessed in accordance with the tariff governing the ayuntamiento, and that the original of the said papers should be filed for perpetual evidence, and that by the first mail a certified copy thereof should be forwarded to the governor of the province for his information, and a like copy to the party interested for his security; or whether the said Juan Gid complied with all of the conditions and requirements of said grant and the laws under which it was made so far as was required to do by law and the acts of the grantor.

And the United States, further answering, denies that by virtue of

the proceedings of the ayuntamiento of El Paso and of the said Juan Gid that any lawful title to the said tract of land in the said petition described vested in the said Juan Gid, or that the said Juan Gid thereby obtained an absolute and perfect title to the
44 said tract of land; and, further answering, says that under and by virtue of the provisions of the law of January 4, 1823, or of the provisions of any other law then in force, the ayuntamiento of El Paso had no power or authority to make a grant of land to said Juan Gid in manner and form set forth in the petitioner's petition, and that the said constituent congress of Mexico decreed on April 7, 1823, that all acts of the preceding government, being the government by which the said colonization law of January 4, 1823, was enacted, under the provisions of which the petitioners in their petition claim the said alleged grant to John Heath or Juan Gid was made from May 19, 1822, to March 29, 1823, were illegal and subject to be revised, confirmed, or revoked by the government then established, and that the said colonization law of January 4, 1823, was afterwards, to wit, on April 11, 1823, by the decree of the said congress suspended until a new resolution on the subject, by reason whereof all the proceedings of the said ayuntamiento of El Paso respecting the said alleged grant of land *was* illegal and void and of no effect.

Further answering, the United States says that on the 11th day of April, 1823, the constituent congress suspended the colonization law of January 4, 1823, and authorized persons who had acquired rights under said law to present their claims to the new government for the ratification or rejection, and that said Heath did not nor did any one for him ever present to said Mexican government, as provided by law, said claim for ratification and approval, and by reason of his failure to so present the same abandoned and released the same to said government.

That from the time of said alleged grant until the treaty of Guadalupe Hidalgo said Heath did not nor did any — for him ever present to the Mexican government any claim for said property or ever asserted any right to or ownership over the same, but totally abandoned it.

That from the change of sovereignty under the treaty of Guadalupe Hidalgo to the institution of this suit, although there existed a law of July 22, 1854, for the assertion of such claims, said Heath did not nor did any — for him or in his behalf ever assert any
45 interest in or right to said property in any way.

That for the space of seventy years prior to the institution of this suit no claim was ever asserted by said Heath or any one for him or in his behalf or for any interest in said property in any of the tribunals in any manner, as provided by the laws of Mexico or the United States.

And the United States, further answering, says that it is informed and believes that said Gid some time in the year 1824 left permanently the Republic of Mexico without having alienated said land and became domiciliated in the United States of America, and

thereby abandoned and forfeited all rights to or interest in said property to the Mexican nation.

The United States, further answering, says that the petitioners herein in their said petition set up a claim to said tract or grant of land in said petition, more fully described as the heirs and legal representatives of the said John Heath or Juan Gid, deceased.

That the United States is informed, and believes it to be true, that said John Heath never at any time lawfully became a citizen of the Mexican Empire or the Mexican Republic, but was at all times until his death a citizen and resident of the United States of America and domiciliated therein, and at that time and at all times thereafter up to the present the heirs of said John Heath or Juan Gid were citizens and residents of the United States of America and domiciliated therein. Heirs as citizens of the United States under and by virtue of the laws of the Republic of Mexico in such case made and provided could acquire by inheritance no right, title, or interest in or to the land so aforesaid claimed by the petitioners to have been granted to their ancestor, the said John Heath or Juan Gid.

46 And the United States, further answering, says that it is informed and believes that in the years 1851, '2, '3 the commissioner general of the Republic of Mexico to found and establish civil colonies in the State of Chihuahua, Republic of Mexico, and pretending to act on behalf of the national government, located and settled upon a portion of the land included within the outboundaries of the alleged grant of said Juan Gid west of the Rio Grande river several colonies of Mexican citizens and distributed the land among said colonists. Said colonies were known as the "Mesilla civil colony" and the "Santo Tomas de Iturbide;" which said colonies and allottees thereof and those claiming under them have ever since been in the actual possession of the same, but whether said action by said commissioner was authorized by law and whether his action in that behalf was properly and lawfully taken, so as to vest said colonists or any of them with title against the Mexican nation and the United States, it is not informed, but says that claims for the land so assigned by said commissioner to said colonists are now being prosecuted in this court under the provisions of the act of Congress approved March 3rd, 1891, creating the court of private land claims, and the stipulations of the Gadsden treaty, made December 30th, 1853, and ratified June 20th, 1854, but as to whether the same are valid and subsisting claims this defendant has no knowledge or information sufficient to enable it to form a belief.

The exact description of the land so allotted to said colonists this defendant cannot state, but the said lands are within the outboundaries of this grant, as above stated.

And the United States, further answering, says that it is informed and believes that in the year 1853 the commissioner general and agent for the government of Mexico for the emigration of New Mexicans and establishing and regulating the colonies on the right bank of the Rio del Norte, in the district of Brazos, in the State of

Chihuahua, and claiming to act for the Republic of Mexico,
47 did grant to one Jose Manuel Sanchez Baca a tract of land situate on the west bank of the Rio del Norte within the outboundaries of the said alleged grant made to said Juan Gid, and the said Jose Manuel Sanchez Baca and his heirs and assigns have been in possession of the said tract of land so claimed to have been granted to him by said commissioner ever since the date of said alleged grant, but as to whether said action by said commissioner was authorized by law and whether his action in that behalf was properly and lawfully taken so as to vest said Jose Manuel Sanchez Baca with title against the Mexican nation and the United States it is not informed, but says that a claim for said land is now being prosecuted in this court under the provisions of the act of Congress approved March 3rd, 1891, creating the court of private land claims, and in the stipulations of the Gadsden treaty made December 30th, 1853, and ratified June 20th, 1854, but as to whether or not the same is a valid claim this defendant has no knowledge or information sufficient to enable it to form a belief.

Further answering, the United States says that it is informed that between the years 1839 and 1844 certain officials of the department and alleged State of Chihuahua undertook to appropriate a large portion of the property included within the outboundaries of the alleged grant to Juan Gid lying east of the Rio Grande river by colonizing upon the same a number of Mexican citizens, commonly known and called the Don Anna Bend colony, and a large number of Mexican citizens were placed upon said property by the said officials and allotments made to them of land, which they and those claiming under them have been continuously since in possession of. The exact description of the property so alleged to have *have* allotted to the Don Anna Bend colonists defendant cannot state further than that it lies within the outboundaries of the said John Heath grant.

That as to whether in making said allotment and giving posession to said colonists, jointly or severally, said officials were author-
ized by law thereto it has no knowledge or information
48 sufficient to enable it to form a belief, but says there is now pending in the court of private land claims a suit for the confirmation of said claim under the provisions of the act of March 3, 1891, creating the court of private land claims, and according to the stipulations of the treaty of Guadalupe Hidalgo, under which the United States acquired sovereignty over the same, but as to whether or not the acts of said officials created any right of property in said colonists or in any of them against the Mexican government or the United States it has no knowledge or information sufficient to enable it to form a belief.

And the United States, further answering, says that said tract of land so alleged to have been granted to said John Heath having been abandoned and forfeited, as herein set forth, and the United States, having received the same under the treaty of Guadalupe Hidalgo as a part of the public domain, extended its public surveys over a large portion of said tract and a large number of entries

under the public land laws of the United States have been made within its exterior boundaries, and this defendant charges that such extension of public surveys over the said tract was a resumption of sovereignty by the United States over the same and was a forfeiture declared by the United States of all right, title, and interest in said lands which the said John Heath might have had therein.

Said defendant, further answering, says that by the terms of said alleged grant the same was made subject to the approval thereof by the governor and the territorial deputation of the Territory of New Mexico within whose jurisdiction the said lands were situated, and that the said alleged grant after the making thereof was transmitted to said governor and territorial deputation for their approval, and such action was taken by the said governor and said territorial deputation that the said grant was disapproved and declared by them to be without warrant and authority of law in the said ayuntamiento of El Paso to make the same.

Wherefore the United States says that by reason of the
49 facts aforesaid said claim is not one which under the laws of nations, the treaties of cession, or the laws or ordinances of the government of Mexico or the principals of equity or the act creating this court it is bound to recognize; and it therefore prays that said grant may be rejected and plaintiffs' petition dismissed.

(Signed) MATT. G. REYNOLDS,
U. S. Attorney.

50 Be it further remembered that afterwards, to wit, on the 21st day of May, A. D. 1895, the same being the 7th day of the May term, A. D. 1895, the following further proceedings were had in the said cause, to wit:

J. B. CESNA *et al.*
vs.
UNITED STATES.

The above-entitled cause having been set out for trial at a former term of the court, and the same cause now coming on to be heard, it is ordered by the court that this cause be, and the same hereby is, reset for trial on the 14th day of June, 1895.

51 Be it further remembered that afterwards, to wit, on the 18th day of June, 1895, the same being the 30th day of the May term, A. D. 1895, the following further proceedings were had in the said cause, to wit:

J. B. CESNA *et al.*
vs.
UNITED STATES.

The above-entitled cause now being called for trial, there appeared J. B. Cesna and T. B. Catron, Esqs., for and on behalf of the petitioners herein; James W. Vroom, Ralph E. Twitchell, and Henry L. Waldo, Esqs., for and on behalf of the Rio Grande Town Com-

pany and New Mexico Land Company; E. A. Fiske and C. H. Springer representing the heirs and unknown owners of the Bracito grant; Summers Burkhardt, Esq., assistant United States attorney, representing the said defendant, The United States. The trial of the cause was procee led with on the pleadings presented.

Documentary proof was introduced, and, the same not being completed, *when* the court adjourned until tomorrow at 10 o'clock a. m.

52 Be it further remembered that afterwards, to wit, on the 19th day of June, A. D. 1895, the same being the 31st day of — May —, 1895, the following further proceedings were had in the said cause, to wit:

J. B. CESNA *et al.*
vs.
UNITED STATES.

The trial of the above-entitled cause was resumed. All the attorneys in the cause being present, further oral and documentary proof was introduced, and, the cause not being complete, *when* the court adjourned until tomorrow at 10 o'clock a. m.

53 Be it further remembered that afterwards, on the 10th day of June, A. D. 1895, an answer was filed in said cause in the office of said clerk; which said answer is in the words and figures following, to wit:

54 In the United States Court of Private Land Claims.

J. B. CESSNA *et al.*
vs.
THE UNITED STATES *et al.*

The answer of Sarah V. Casad, Humbolt Casad, Alice Casad, Maud Casad, Jessie Casad, Gertrude Casad, Darwin Casad, Thomas Casad, Leonora White, R. J. White, Jennie Lane and N. D. Lane, her husband, and Herman Casad Smith, widow and heirs of the late Thomas Casad, claimants and owners of a portion and part of the Brazito grant and made defendants in this cause as unknown owners of said Brazito grant, to the petition of J. B. Cessna *et al.*, petitioners.

These defendants, for answer to the petition of the said J. B. Cessna *et al.*, respectfully show unto your honors that they do not know and are not advised whether one John Heath, alias Juan Gid, made a petition to the ayuntamiento of El Paso, as stated in said petition, nor whether the said ayuntamiento did or performed any or all of the acts set forth in said petition, nor whether any proceedings were had, as stated in said petitioners' said petition, nor whether the said ayuntamiento of El Paso made or pretended to make any grant to John Heath, alias Juan Gid, as stated in said petition, or marked off to or surveyed to or put the said John Heath,

alias Juan Gid, into the possession of any tract or portion of land, as set forth in said petition of said petitioners, nor that any such land was measured or was in extent from the center thereof, as stated in said petitioners' said petition, nor that any plat of said land was made, as stated in said petition of said petitioners; and these defendants, therefore, neither admit nor deny said allegations and statements of said petitioners' said petition, but leave the said petitioners to their proof thereof as they shall be advised.

55 And these defendants, further answering, deny that any grant of land was made by any lawful authority of the government of Mexico to said John Heath or Juan Gid, as in said petitioners' said petition stated, and deny that the said John Heath or Juan Gid complied with all or any of the conditions or requirements of any such grant, as stated in said petitioners' said petition, and deny that any grant or pretended grant to said Juan Gid became an absolute and perfect grant or grant of any right, title, or interest in or to any lands, as stated in said petition, and that said petitioners or any of them are heirs, descendants, or legal representatives of the said Juan Gid, or that they or any of them are owners in fee or of any interest in the lands mentioned in said petition of said petitioners or any part thereof, and deny that said petitioners or any of them have any right, title, or interest therein under the proceedings stated and set forth in said petitioners' said petition.

And these defendants, further answering, state that they admit that within the limits of the said pretended grant to the said John Heath, alias Juan Gid, there is a large number of settlements and many people residing, as stated in said petitioners' said petition.

And these defendants, further answering, show unto your honors that in the year 1822 and before the date of the alleged making of the said pretended grant to John Heath, alias Juan Gid, the said grant known as the Brazito grant, and in which these defendants claim title and interest, was made by the duly constituted authorities of the Mexican government to one Juan Antonio Garcia, who then and there became and was the lawful owner of the said Brazito grant, with boundaries beginning at a point on the Rio

56 Grande, known as the mouth of the Brazito acequia, and running south along the said river to a lake known as Trujillo lake, and thence extending back towards the east from said river to a range of sand hills, and thence in a northerly direction along said sand hills to a point due east from the place of beginning, and thence to the place of beginning, containing about 18,000 acres; that thereafter, on, to wit, the 6th day of August, 1856, the said grant to the said Juan Antonio Garcia was presented to the surveyor general of the United States for the Territory of New Mexico, as claim No. 32, for approval under the provisions of the act of Congress approved July 22, 1854, and thereafter, upon the archive and other documentary evidence and oral testimony then and there produced before the said surveyor general, the said grant to the said Juan Antonio Garcia was duly tried and determined by the said surveyor general, and by the opinion of the said surveyor general, dated at Santa Fé, N. M., on the 31st day of December, 1856, the

said grant was by the said surveyor general adjudged to be a good and valid grant and by the said surveyor general recommended for confirmation to the said Juan Antonio Garcia by the Congress of the United States, and duly transmitted the title papers of said grant and his opinion and his said recommendation to the Commissioner of the General Land Office of the United States, at Washington; that thereafter the said Commissioner of the General Land Office, by his letter dated February 10th, 1857, in due form of law, submitted the said grant and said recommendation of the said surveyor general to the Hon. Secretary of the Interior of the United States, and that thereafter, on, to wit, the 11th day of February, 1857, the said Secretary of the Department of the Interior of the United States
57 duly transmitted the said grant, with the said recommendation of the said surveyor general aforesaid, to the Congress of the United States; that thereafter, on, to wit, the 12th day of January, 1858, the said surveyor general of the Territory of New Mexico, in his letter of that date, recommended to the Hon. Commissioner of the General Land Office of the United States, at Washington, D. C., a renumbering of the claims and grants by him recommended for confirmation, and in such renumbering the said grant to the said Juan Antonio Garcia was numbered as grant No. 6, which said recommendation for the renumbering of said claims was by the Commissioner of the said General Land Office, on the 2nd day of March, 1858, duly transmitted to the Secretary of the Interior, and thereafter, on the 28th day of March, A. D. 1858, by said Secretary of the Interior to the Congress of the United States; and thereafter, by section 1 of an act of said Congress approved June 21st, A. D. 1860, and duly printed as chapter 167 of the Statutes at Large of the United States, at page 71 thereof, the said Congress of the United States duly confirmed the said grant to Juan A. Garcia, as recommended by the said surveyor general of New Mexico, whereby the said grant so recommended as aforesaid became and was a perfect title to the said Juan Antonio Garcia and his legal representatives for all and singular the land mentioned and described in the said grant and the said recommendation of the said surveyor general of the Territory of New Mexico; and thereupon these defendants, further answering, state and show unto your honors that under and by virtue of the act of Congress approved on the 3rd day of March, 1891, as set forth and indicated in the fourth clause of the
58 13th section of the said act and in the 14th section of said act, the said petitioners are estopped and prohibited from claiming or setting up any claim to any part or portion of the said Brazito grant so made to the said Juan Antonio Garcia and so allowed and lawfully acted upon and decided by the said Congress of the United States and so conveyed and granted by the said United States to the said Juan Antonio Garcia and his legal representatives as aforesaid.

And these defendants, further answering, state and show unto your honor that the said pretended title papers, as set forth and referred to in the said petitioners' said petition, were, if executed as stated in the said petition, so made and executed without any au-

thority of law, and were null, void, and of no effect whatever, and especially were not in accordance with or conformity to the decree or law of Mexico of the 3rd day of January, A. D. 1823, under which said alleged grant to said John Heath or Juan Gid is pretended to have been made.

And these defendants, further answering, state and show unto your honors that after the said pretended acts and the said pretended grant, as stated in said petition of said petitioners, on, to wit, the 24th day of June, 1823, the said pretended grant and all proceedings relative thereto were annulled by the superior authority of the said ayuntamiento, at El Paso, who in the petitioners' said petition is therein alleged to have made said pretended grant.

And these defendants, further answering, state and show unto your honors that the said decree of January 23rd, 1823, as to the said proceedings made and had as stated in said petitioners' said petition, and under which said petitioners claim and allege that a grant was made to the said John Heath, alias Juan Gid, was on,
59 to wit, the 8th day of April, 1823, annulled, as the same appears in section 2 of the decree of the Mexican government of the 8th day of April, 1823, as the same appears duly entered in vol. II of the official collection of ordinances and decrees of the congress of the Mexican nation, on page 90 of the 2nd edition thereof.

And these defendants, further answering, state and show unto your honors that on, to wit, the 11th day of April, 1823, the proper authorities of the said Mexican nation suspended the said colonization law of January 3rd, 1823, as the same appears in the said official book of said orders, decrees, and acts of the congress of the Mexican nation, on page 94 thereof.

And these defendants hope that they shall have the same benefit and advantage by this their answer as they would if they had demurred to the said petition of the said petitioners.

EUGENE A. FISKE,
FRANK SPRINGER,
Solicitors for Above Defendants.

60 And be it further remembered that afterwards, to wit, on the 20th day of June, A. D. 1895, the same being the 32nd day of the May term, 1895, the following further proceedings were had in said cause, to wit:

J. B. CESNA *et al.*
vs.
UNITED STATES.

The trial of the above-entitled cause was resumed. All the attorneys in the cause being present, further oral and documentary proof was introduced, after which the cause was partially argued by counsel, and, the arguments not being concluded, the court adjourned until tomorrow at 10 o'clock a. m.

61 Be it further remembered that afterwards, to wit, on the twentieth day of June, A. D. 1895, a certificate of the official

translator was filed in said cause in the office of said clerk; which said certificate is in the words and figures as following:

62 *Official Translation of Article 4th of National Colonization Law of 4th of January, 1823, Correcting Tipton's Translation of the Same to be Found in Defendant's Exhibit No. 6 in Cessna vs. United States.*

"The families who came of themselves to settle shall present themselves immediately to the respective ayuntamiento of the place at which they desire to establish themselves in order that, in conformity with the orders which they may find from the executive, there be designated to them by that body the lands to which they are entitled according to the industry which they are going to undertake."

Translated by me from the original Spanish on this 20th day of June, A. D. 1895, and I certify that it is true and correct.

EUSEBIO CHACON,
Official Interpreter and Translator,
Court of Private Land Claims.

63 And be it further remembered that afterwards, to wit, on the 21st day of June, A. D. 1895, the same being the 33th — of the May term, A. D. 1895, the following further proceedings were had in the said court, to wit:

J. B. CESNA *et al.*
vs.
UNITED STATES.

The hearing of the above-entitled case was resumed. All the attorneys in the cause being present, further arguments were presented by counsel on both sides, and, the same not being concluded, the court adjourned until tomorrow at 10 a. m.

64 And be it further remembered that afterwards, to wit, on the 22d day of June, A. D. 1895, the same being the 33d day of the May term, 1895, the following further proceedings were had in the said cause, to wit:

J. B. CESNA *et al.*
vs.
UNITED STATES.

In the above-entitled cause the court resumed the hearing of arguments by counsel, and, the same having been concluded, the cause was submitted, and the court, not being sufficiently advised in the premises, took the said cause under advisement.

65 Be it further remembered that upon the trial and hearing of said cause before said court of private land claims the following proceedings, as reported by the official stenographer of said court, were had, to wit:

66 In the Court of Private Land Claims, District of New Mexico.

J. B. CESSNA *et al.*
vs.
THE UNITED STATES *et al.* } No. 59. (Juan Heath Grant.)

Transcript of Trial.

Upon the trial of this cause, commencing the 18th day of June, A. D. 1895, the following proceedings were had, to wit:

Counsel for the parties:

J. B. Cessna (*per se*) and T. B. Catron, for the petitioners.

Matt. G. Reynolds, Esq., Summers Burkhart, Esq., for the United States.

F. Springer, Esq., H. L. Waldo, Esq., S. B. Newcomb, Esq., E. A. Fiske, Esq., J. W. Vroom, Esq., for certain respondents.

67 Mr. CESSNA: We shall offer the grant which was made to us by the Mexican government under the law of January 4th, 1823.

(Nothing identified.)

I will read first the depositions which pertain to that question.

Mr. SPRINGER: If the court please, there are a number of questions and matters connected with these depositions to which objections can be made and will be made. I am not acquainted with the practice of this tribunal as to whether it is necessary to make the objections to each question or whether we can make a general objection and save the right to offer such other objections as we may think proper. There is a large amount of this testimony, for instance, which we consider hearsay, but I do not desire to interrupt the reading to interpose objections.

Mr. CESSNA: I would prefer that objections would be made and the argument on them all at once.

By the COURT: You may offer your objections all at once and present the points when the case is argued.

Mr. SPRINGER: I shall object to the proposed exhibits as being irrelevant, incompetent, and immaterial for any purpose in this case, and I will make a general objection to the testimony of these witnesses as being hearsay, irrelevant, and immaterial.

(Upon counsel being asked to which paper he referred in the first part of his objection he stated the instrument offered in connection with the first deposition)—Ex. C.

Mr. CESSNA: We offer in evidence the first deposition—that of Enrique Palmer.

(Which said deposition was marked Exhibit "A" and read to the court.)

68 The next deposition is that of Mrs. Belinda N. Jones, which I offer in evidence.

(Which said deposition was marked Exhibit "B" and read to the court.)

I now offer a certified copy of the records of Louisiana to show that this notary public was a notary.

(Which said document was marked Exhibit "C" and read to the court.)

I next offer in evidence deposition of Eliza J. Bibb.

(Which said document was marked Exhibit "D" and read to the court.)

Mr. SPRINGER: Admitted subject to an objection on the part of the defendants to all the testimony of the witness which purports to give statements made to witness by other persons, it being an attempt to give testimony about matters of which witness shows no personal knowledge, and we move to strike out all such answers of that character.

Mr. CESSNA: We next offer the deposition of Francis I. Heath in evidence.

(Which said deposition was marked Exhibit "E" and read to the court.)

Now offer in evidence the deposition of John Best.

(Which said deposition was marked Exhibit "F" and read to the court.)

I now offer in evidence the deposition of Mrs. Esther C. Hunter taken in this cause.

(Which said document was marked Exhibit — and read to the court.)

Mr. CATRON: We now offer in evidence the deposition of John B. Keedle taken in this cause.

69 (Which said deposition was marked Exhibit "G" and read to the court.)

We now offer the deposition of Mary R. Keedle taken in this cause.

(Which said deposition was marked Exhibit "H" and read to the court.)

Offer in evidence testimony of Major H. H. Hughes taken by deposition.

(Which said deposition was marked Exhibit "I" and read to the court.)

Now we offer in evidence the deposition of James Bryan.

(Which said deposition was marked Exhibit "J" and read to the court.)

We next offer in evidence the deposition of Charles A. Woodruff taken herein.

(Which said deposition was marked Exhibit "K" and read to the court.)

We now desire to offer the deposition of Magdalena de Carranco taken in this cause.

(Which said deposition was marked Exhibit "L" and read to the court.)

At the completion of which court was ordered to stand adjourned until tomorrow (Wednesday) morning at 10 o'clock a. m.

WEDNESDAY, *June 19th*, 1895, at 10 o'clock a. m.

Court met, pursuant to adjournment, and the following proceedings were had in this cause, to wit:

Mr. CATRON: We now offer the deposition of Price Cooper.

(Which said deposition was marked Exhibit "M" and read to the court.)

70 We now offer the deposition of Gregoria Herrera taken in this cause.

(Which said document was marked Exhibit "N" and read to the court.)

Now offer the deposition of T. T. Teel taken in this cause.

(Which said deposition was marked Exhibit "O" and read to the court.)

Mr. CESSNA: I have now a number of certified copies of deeds for properties in Missouri, made by John G. Heath, from the records of deeds of the different counties. The object of these is to show first the circumstances of Heath, and to show that he disposed of his property and that he prepared to leave for good. I will not read them, but I will give a general synopsis of them. I first offer now this deed (interrupted)——

Mr. SPRINGER: Defendants object to the introduction of these deeds as being irrelevant.

Mr. FISKE: And that objection will go to all of them. It makes no difference whether he disposed of his property or whether he gave it away so far as this case is concerned.

Mr. CATRON: The court will consider that to the extent of showing his good faith—the good faith of Heath in disposing of this land with the intention of leaving it.

Mr. FISKE: Even if he sold his lands and intended to go that is no evidence that he did go, and therefore is absolutely immaterial.

Mr. CATRON: It is a circumstance showing that he did go.

Mr. FISKE: It is a circumstance showing one thing, that he sold his land and no more. It is not a circumstance that he went on this property.

Mr. CATRON: It is a circumstance showing that he intended to go and that he intended to stay.

71 By the COURT: They may be introduced subject to the objection.

Mr. CESSNA: We offer in evidence deed from John G. Heath to Robert A. Heath, dated the 17th of April, 1824, for various tracts of land.

(Which said document was marked Exhibit "P.")

We next offer deed, John G. Heath to Robert A. Heath, dated April 17th, 18—.

(Which said document was marked Exhibit "Q.")

Next offer certified copy of bill of sale, Robert A. Heath and John G. Heath to Joseph Reavis, dated the 6th of April, 1824.

We next offer copy of the record, certified to by the authorities of the city of Mexico, of the first petition referred to in the second petition of John G. Heath, made in 1822, prior to the law of 1823, referred to in the present petition.

Mr. FISKE: Has it been translated?

Mr. CATRON: Part of it is found in English and part of it is in Spanish.

(Which said document was marked Exhibit "S.")

Mr. FISKE: I ask that it be read, so that we can get a general idea of what it is.

Mr. SPRINGER: We desire to reserve the right to make any objections we may desire after having a copy and translation of it to examine.

(Said document was then translated verbally to the court by the official interpreter.)

Mr. CESSNA: We now offer properly certified letters of guardianship to James Scott, the estate of L. Ethel Scott *et al.*, dated
72 January 11th, 1893.

(Which said document was marked Exhibit "T.")

I now offer deed, R. W. Sherman to J. B. Cessna.

(Which said document was marked Exhibit "U.")

Mr. CESSNA: I have a certified copy of the grant. We will introduce the original and use the certified copy, filed in the office on the 17th of June, 1823, and is archive No. 410.

(Which said document was marked Exhibit "V.")

Mr. FISKE: If the court please, I understand *as* a part of this grant is a- action of the departmental assembly, and that they offer all the papers.

Mr. CATRON: That is a separate paper, not a part of the grant, and we shall offer that for what it is.

Mr. CESSNA: Yes; that is another paper.

Mr. VROOM: On behalf of the respondants we object to the reception in evidence of archive No. 410, entitled "Heath, John G.; grant, 1823, No. 505," now on file in the office of the United States surveyor general for New Mexico, because:

1st. The ayuntamiento of El Paso had no power under the provisions of the decree of the junta instituyente of January 4th, 1823, providing for "the distribution of land to foreigners who come to colonize," to grant lands to the said Heath either as an empresario or contractor or as a colonist.

2nd. Because the concession to the said Heath conferred but an inceptive and inchoate title, which was not confirmed by either the governor and provincial deputation of New Mexico or by the supreme government.

3rd. Because the said archive No. 410 is neither the protocol nor testimonio of the alleged concession to the said Heath, and that no foundation has been laid by the petitioners for the introduction of these papers as secondary ecidence.

73 4th. Because the said concession was not "located or duly recorded in the archives of Mexico," as required by article VI of the treaty between the United States and Mexico, dated December 30, 1853.

Mr. SPRINGER: And we object also to the copy offered here as not being a correct copy of the original.

Mr. CESSNA: What we next offer is an extract from the proceed-

ings of the departmental assembly, dated the 17th of June, 1823, both in Spanish and English, properly certified.

(Which said document was marked Exhibit "W" and read to the court.)

Mr. SPRINGER: We object to the translation of it as not being correct.

Petitioners rest.

For the United States and Other Respondants.

The several answers read to the court.

Mr. BURKHART: We will introduce in evidence the original letters transmitting the copy of the proceedings of the ayuntamiento of El Paso to the governor of New Mexico, included in and as a part of archive 410.

(Which said document was marked Defendants' Exhibit No. 1 and a translation thereof marked Defendants' Exhibit No. 2.)

We also ask to introduce a certified copy from the archives of Juarez, a letter from Francisco Javier Chaves, secretary of
74 the provincial deputation, to the ayuntamiento of El Paso, dated June 19th, 1823, which is a letter advising that body of the action of the provincial deputation of New Mexico on the Heath grant.

(Which said document was marked Defendants' Exhibit 3 and translation thereof marked Defendants' Exhibit 4.)

Mr. CATRON: We object to it as being made subsequent to the vesture of title in the grantee, and therefore immaterial and incompetent.

Mr. BURKHART: We next desire to offer the Iturbide colonization law of 1823, which is archive No. 1107.

(Which said document was marked Defendants' Exhibit No. 5.)

We also file copies of articles 2 and 4 of that law and translations of the same.

(Which said copies of articles 2 and 4 are marked Defendants' Exhibit No. "5*a*" and translations thereof Defendants' Exhibit 6.)

We also offer in evidence a translation of the decree of the constituent congress of Mexico of date April 8th, 1823.

(Which said translation is marked Defendants' Exhibit No. 7.)

We next offer in evidence decree of the constituent congress of Mexico of date April 11th, 1823—translation of it.

(Which said document was marked Defendants' Exhibit No. 8.)

We offer in evidence translation of the title papers in this case—that is, of archive 410, according to our claim.

(Which said document was marked Defendants' Exhibit No. 9.)

We next offer in evidence the report of the U. S. surveyor
75 general for New Mexico in reported No. 6, filed in the surveyor general's office.

(Which said document was marked Defendants' Exhibit No. 10.)

Mr. CATRON: We object to it as irrelevant and immaterial.

CHARLES F. EASLEY, a witness called and sworn on behalf of the respondants, testified as follows:

Direct examination by Mr. BURKHART:

Q. What official position, if any, do you occupy?
A. The office of surveyor general.
Q. Have you in your possession the files of a claim presented to the surveyor general known as the Stevenson grant, reported No. 6?
A. Yes, sir.
Q. Have you them with you?
A. Yes, sir.

(Witness produces papers.)

Mr. BURKHART: We introduce in evidence the files of the claim known as the Stevenson grant, reported No. 6 in the surveyor general's office and confirmed by Congress.

Mr. CATRON: We wish it to go in subject to the objection.

Q. What is that (show- witness a map)?
A. This is file No. 7 in the Hugh Stevenson case, reported No. 6. It purports to be a sketch or map of the Bracito tract of land made from a survey executed by one Steven Archer, deputy surveyor.

(By Mr. FISKE:)

Q. Is that map included among the papers of this claim submitted by the surveyor general of New Mexico in his report to Congress recommending this claim for confirmation, this claim No. 6?

76 A. I cannot answer that question without examining the report. The report will show what papers were sent, what papers were submitted. This plat belongs in this case; it is docketed as file No. 7.

(By Mr. BURKHART:)

Q. When was it filed, Mr. Easley?
A. The index on it is that it was filed in claim No. 30, Hugh Stevenson heirs, Juan Antonio Garcia. I will have to examine the docket in the case to tell you when it was filed.

Mr. CATRON: Objection will be made, not to all of these papers as filed, but to each one separately, to each paper.

(By Mr. FISKE:)

Q. Now, is this Stevens survey a part of the files of your office which were sent to Congress with the report of the surveyor general when he submitted this claim for confirmation?
A. Yes.
Q. Have you a recent survey of that grant made by your office?
A. Yes; a resurvey.
Q. What date was this Archer survey filed in your office?
A. The docket shows it to have been filed on August 6, 1856, with the petition of claimants.

Q. Have you a recent survey of the Hugh Stevenson or Bracito tract made by the Government?

A. Yes, sir.

Q. Please look at your files and see if you have that last survey.

A. *A.* (Producing map.) This is a map prepared from the field-notes of the official survey, of the resurvey as made by the Government, by Deputy Surveyor L. M. Brown, in May, 1893.

(Mr. BURKHART:)

Q. Have you another survey of that grant on the part of the Government?

A. Yes, sir.

Q. By whom was that plat made and from what?

A. The survey of this plat—the field-notes were executed by Elkins and Marmon in 1878.

Q. Are there any more plats of that grant in your office?

77 A. No, sir; I believe not.

Mr. BURKHART: We offer in evidence the plats of the Bracito grant surveyed and made by Steven Archer, surveyor, made in 1854, being plat filed by claimants for the Hugh Stephenson grant for the claim and being file No. 7, reported No. 6, surveyor general's office.

(Which said plat — marked Defendants' Exhibit No. 11.)

Mr. CATRON: Objected to as incompetent, irrelevant, and immaterial, and that no proper foundation has been laid for its introduction.

Admitted subject to the objection.

Mr. BURKHART: We offer in evidence the plat of the Hugh Stevenson grant on the survey made by Elkins and Marmon, U. S. deputy surveyors, in March, 1878.

(Which said plat was marked Defendants' Exhibit No. 12.)

Mr. CATRON: Objected to as incompentent, irrelevant, and immaterial, and that no proper foundation has been laid for its introduction.

Admitted subject to the objection.

Mr. BURKHART: We offer in evidence the plat of the Hugh Stevenson or Bracito tract, surveyed by L. M. Brown, U. S. deputy surveyor, in 1893.

(Which said plat was marked Defendants' Exhibit No. 13.)

Mr. CATRON: Objected to as incompetent, irrelevant, and immaterial, and that no proper foundation has been laid for its introduction.

(No ruling.)

(Mr. BURKHART:)

Q. Do these plats purport to have been made from the field-notes returned and filed in your office?

Mr. CATRON: We object to that as not the best evidence
78 and that no proper foundation has been laid.
(No ruling.)

A. Yes, sir.

Same objection.

Q. Have you the field-notes of the survey in your office?
A. Yes, sir.
Q. Produce them.
A. Here are the field-notes of the Brown survey (Defendants' Exhibit No. 13.)

Mr. BURKHART: We offer in evidence the field-notes of the survey executed by L. M. Brown in 1893, marked Books 1 and 2.
(Which said books were marked Defendants' Exhibits 14 & 15.)
We also offer in evidence the field-notes of the *the* survey of the Hugh Stevenson grant executed by Elkins and Marmon, deputy surveyors.
(Which said book or books should be marked Defendants' Exhibit 16.)
Mr. CATRON: We object to their introduction for the reason that no proper foundation has been laid and that they are not the best evidence.
It is admitted by counsel for petitioners that this claim of Hugh Stevenson or Bracito tract, reported No. 6, has been confirmed by Congress and approved June 21, 1860, and was file 32 as originally reported. (See 12 Statutes at Large, page 132.)
Mr. FISKE: Simply as showing the interests of the parties which I represent, I desire to offer in evidence transcript of the records of the third judicial district, county of Donna Ana, of this Territory, showing the various interests as determined.
Mr. CATRON: I object to it as not being the best evidence.
Mr. FISKE: I offer a certified copy of the records. I don't know any better evidence than that.
79 Mr. CATRON: We object to this proof as improper, irrelevant, and immaterial, and as a matter of fact it is hearsay proof.
(Admitted subject to the objection.)

(Mr. BURKHART:)

Q. Have you in your custody the claim known as the Dona Ana Bend grant and also known as reported to Congress No. 85?
A. Yes, sir.
Q. Produce it please.

(Witness produces papers.)
Mr. BURKHART: We offer in evidence the files of the claim before the surveyor general known as the Dona Ana Bend Colony grant, reported No. 85——

Q. Has it a file number in your office?
A. No. 161.

Mr. BURKHART (continuing): —and known as file No. 161 in the office of the surveyor general, with the report of the surveyor general thereon.

Mr. CATRON: We object to each and every paper as incompetent, irrelevant, impertinent, and immaterial to this case and as not being the best evidence.

Admitted subject to the objection.

Q. Have you in your custody the files of the claim known as the Mesilla Colony grant, as reported number 86?

A. Yes, sir.

Q. Has it a file number in your office?

A. Yes; 162.

Mr. BURKHART (exhibiting papers): We offer in evidence these files, being the files in the claim known as the Misilla Colony grant, reported No. 86, file No. 162, in the office of the surveyor general.

Mr. CATRON: We object to it as incompetent—to each and every paper as incompetent, irrelevant, impertinent, irrelevant, and as mere rubbish, no proper foundation being laid for their introduction, and as not being the best evidence.

(Admitted subject to the objection.)

Q. Have you in your office the papers of the claim known as Santo Tomas de Iturbide, reported No. 139?

A. Yes, sir. (Witness produces papers.)

Q. What is the file number in your office?

A. File 201.

Mr. BURKHART: We offer in evidence the files of the surveyor general's office in the claim known as the Santo Tomas de Iturbide, reported No. 139, file No. 201.

Mr. CATRON: I make the same objection to each and every one of these papers as to those of the Mesilla Colony grant.

(Admitted subject to the objection.)

Q. Have you in your custody the papers files in the claim for the grant known as the Jose Manuel Sanchez Baca, reported to Congress as No. 129?

A. Yes, sir (producing them).

Q. What is the number in your office?

A. File No. 124.

Mr. BURKHART: We offer these papers in evidence (exhibiting them), being the papers on file in the surveyor general's office in the claim known as the Jose Manuel Sanchez Baca, reported No. 129 and file No. 124.

Mr. CATRON: I make the same objection to each and every one of these papers as I did to those of the Mesilla Colony grant.

Q. Has an official survey of the claim known as the Dona Ana Bend grant been made?

A. Yes, sir.

Q. Have you the official plat here?

A. Yes, sir (producing it).
Q. By whom was it made?
A. Made by Elkins and Marmon in March, 1878.

Mr. BURKHART: We offer in evidence the official plat of
81 the survey of the grant known as the Dona Ana Bend Colony, by Elkins and Marmon, deputy surveyors, in March, 1878, and I also offer the field-notes of said survey.

Mr. CATRON: I object to it as incompetent, irrelevant, immaterial, and impertinent; that no proper foundation has been laid for their admission in evidence and as not the best evidence.

(Admitted subject to the objection.)

Q. Has there been an official survey of the Mesilla Colony grant, known as reported No. 86?
A. Yes, sir.
Q. Please produce the plat.
A. I have a plat (producing one) made by Elkins and Marmon, United States deputy surveyors, made in March, 1878.

Mr. BURKHART: We introduce in evidence the field-notes and plat of the survey of the Mesilla Colony grant, made by Elkins and Marmon, U. S. deputy surveyors, in March, 1878.

Mr. CATRON: I object to its introduction for the same reasons as stated in my objection to the introduction of the plat in the Dona Ana Bend Colony case.

(Admitted subject to the objection.)

Q. Has there been an official survey of the Santo Tomas de Iturbide, reported No. 139?
A. No, sir.
Q. Has there been a survey made of the Jose Manuel Sanchez Baca grant, reported No. 129?
A. Yes, sir (producing plat).

Mr. BURKHART: We offer in evidence the field-notes and plat of the survey made of the Jose Manuel Sanchez Baca grant by John Shaw, U. S. deputy surveyor, in April, 1883.

Mr. CATRON: I object to its introduction for the same reasons as stated in my objection to the introduction of the plat in the Dona Ana Bend case.

(Admitted subject to the objection.)

82 Q. Mr. Easley, these plats which have been introduced are plats which have been made in your office and were official plats prepared and made from the field-notes made by deputy surveyors that are on file in the records of your office?
A. Yes, sir.

Mr. CATRON: I object to it as not being the best evidence.

Q. And the field-notes which we have introduced were the field-notes which have been returned by the respective deputy surveyors who made them, and they so remain in your office?
A. Yes, sir.

Mr. CATRON: I don't know whether the objections made are as full as I would like to make them, and I would like to have an objection go in to all of these papers, each and every one of the papers, documents, field-notes, and plats which have been introduced in these various grants, because they are incompetent and immaterial, impertinent and irrelevant; that no proper foundation has been laid; that because they are not the best evidence.

Q. What is that paper (Mr. Burkhart exhibiting paper to witness)?

A. It purports to be a royal decree and belongs among the archives in my office as archive No. 1107 (already offered by the defendants as Exhibit No. 5).

(BURKHART:)

Q. Mr. Easley, from the official surveys in your office, do you know where the head of the Bracito ditch is located, upon the Rio Grande river, about thirty miles north of El Paso?

A. I know the location with reference to the lines of the public surveys.

Q. Yes.

A. I can determine its location by an examination of the plats of the survey of the Hugh Stevenson grant and surrounding surveys.

Q. Do you know where it is with reference to the public surveys?

A. Yes, sir; I know where it is shown to be by the official
83 maps and returns in my office.

Q. Have the public surveys been extended over the lands within a distance of six and a half miles on each side of the Bracito ditch as located on the official surveys?

A. They have.

Mr. CATRON: That is objected to as not being the best evidence.

Q. What townships are included within six and a half miles on each side of the head of the Bracito ditch—north, south, east, and west?

A. Township 22, townships (interrupted)——

Mr. CATRON: We object to this as impertinent, irrelevant, immaterial, and as an improper way to prove such facts.

A. (Continuing:) Possibly none of township 22 south; townships 23, 24, 25 south, ranges 1, 2, and 3 east; part of range 1, all of range 2, and part of range 3.

Q. What part of range 1?

A. The eastern part; about the eastern four miles along the eastern side; about two-thirds along the eastern side.

Q. Within six and a half miles?

A. Yes, sir; six and a half miles would be the centre of range 1 going west.

Mr. CATRON: We understand that our objection goes to all of this testimony with reference to the location of the Bracito ditch or acequia.

Q. What section or township is at the head of the Bracito ditch?

A. Upon a close examination of this map it appears to be on the southern edge of section 4, township 24 south, range 2 east, and nearly on a line between sections 4 and 9, according to the connection shown on this map.

Q. Is it on the northern boundary of the Hugh Stevenson grant as shown on that plat?

A. Yes, sir; it is.

Q. Have you the plats of townships 23, 24, and 25, ranges 1, 2, and 3 east?

84 A. Yes, sir.

Q. Produce them, please.

A. (Witness produces nine plats.)

Q. Do these plats show how much of the land within a distance of six and a half miles on each side of the head of the Bracito ditch—north, south, east, and west—has been surveyed under the public land laws and how much has been surveyed under claims of land grants?

A. I think they do. I have not examined them as to whether or not the connections have all been made with the grant boundaries.

Q. Have all the lands within that distance of the head of the Bracito ditch been surveyed either under public surveys or private land surveys?

A. Yes, sir.

Q. When were those public surveys made? When did they commence and when was the last one made?

A. The oldest survey seems to have been the survey of township 25 south, range 1 east; that was surveyed in November, 1858; and 25 south, 2 east and 3 east, were each surveyed in 1881. Township 24 south, ranges 1 and 3 east, were surveyed in 1881; township 24 south, range 2 east, was surveyed in 1885; township 23 south, ranges 1, 2, and 3 east, was surveyed in 1885.

Cross-examination by Mr. CATRON:

Q. Have you in your possession as the surveyor general of the Territory of New Mexico the original archives of the Juan Heath Grant case?

A. Yes, sir.

Q. What is the archive number of them?

A. No. 410.

Q. That is an original paper in your archives, and it has been there ever since your office has been created?

A. It is an original paper, I think, from the number that it bears.

85 Q. It is one of the original papers which was turned over to the first surveyor general by the keeper of the Mexican archives; it was not filed in the surveyor general's office?

A. It is an original archive.

Re-examination by Mr. BURKHART:

Q. Mr. Easley, the Hugh Stevenson grant, reported No. 6; the Dona Ana Bend grant, reported No. 85; the Mesilla Colony grant, reported No. 86; the Santo Tomas de Iturbide, reported No. 139, and the Jose Manuel Sanchez Baca grant, reported No. 129, are they within a tract of land having for its centre the head of the Bracito ditch, as shown in the official surveys, and extending six and one-half miles in each direction—north, south, east, and west—from the head of the Bracito ditch, are they within this tract, as shown by the official surveys, either in whole or in part?

A. Yes, sir; I think so.

Recross-examination by Mr. CATRON:

We offer in evidence on behalf of claimants all of the papers in that archive (meaning, presumably, archive 410, which, however, is introduced elsewhere and identified. Ex. V).

Q. Mr. Easley, these five or six grants which you have testified about, outside of the Hugh Stevenson grant, have they ever been confirmed by Congress?

It is admitted by counsel for respondants that none of the grants referred to, save the Hugh Stevenson, have been confirmed by act of Congress.

Mr. CATRON: Do you admit also that there is an application before this court now for their confirmation? It is a fact that there is an application pending before this court for the confirma-
86 tion of each of those grants introduced in evidence, except the Hugh Stevenson claim, which has been confirmed by the Congress of the United States.

The admission was made by counsel for respondants.

Mr. CATRON: I would like to have it admitted also that the Government disputes the validity of every one of these claims.

Mr. BURKHART: It is admitted by the Government's answer that it denies the validity of every claim we have introduced here except the Hugh Stevenson.

Mr. CATRON: Then I move to strike it all out. They can't come in with a claim which they deny the validity of and use it to dispute another claim.

(No ruling.)

Mr. NEWCOMB: I wish to introduce the original grant in the Dona Ana Bend case and I will account for its possession. This is the original and has been in the possession of the Dona Ana Bend colony ever since it was made until it was filed in this court.

(Which said document was marked Exhibit "A" for respondants The Dona Ana Bend Colony.)

Mr. CATRON: Object to it as incompetent, impertinent, and immaterial. No proper foundation has been laid for its introduction. It is not the best evidence.

PALBO MELENDEZ, introduced and sworn as a witness on behalf of the respondants, testified as follows:

On examination by Mr. NEWCOMB:

Q. State your name, age, and residence.
A. My name is Pablo Melendez, I am fifty-nine years old, and live at Donna Ana.
87 Q. How long have you lived there?
A. Ever since the year '43.
Q. What official position, if any, do you hold in the county of Donna Ana now?
A. I am probate judge of the county of Donna Ana.
Q. Are you one of the sons of Pablo Melendres, who was one of the original settlers of the Dona Ana colony?

Mr. CATRON: I object to the form of the question.
(No ruling.)

A. Yes, sir.
Q. What position did your father hold in the colony?

Mr. CATRON: Objected to, as no proper foundation has been laid.
(No ruling.)

A. He was justice of the peace and commissioner to apportion the lands.
Q. Look at that document (handing witness document).
Q. What is that?
A. It is the Dona Ana Bend grant.
Q. In whose possession has it been to your knowledge?
A. In the possession of my father and afterwards in my possession, after he died.
Q. Up to what time was it in your possession?
A. I think it was up to time I delivered it to Mr. Newcomb.
Q. And you delivered it to him to file in this court?
A. Yes, sir.
Q. How did you first come to the colony?
A. I went with my father's family.
Q. You were quite small then?
A. Yes, sir.
Q. Where have you resided ever since?
A. In Donna Ana.
Q. I understood you to say yuour father was one of the commissioners to divide the lands.
A. Yes, sir.
Q. Is his writing in there (referring to the original grant to Donna Ana)?
A. Yes, sir.
Q. This original document has been in your father's and your possession ever since it was issued to the colony?
A. Yes, sir.

88 Mr. NEWCOMB: We reoffer this in evidence.

(Referring to Exhibit "A" for the Dona Ana Bend colony, heretofore identified.)

Mr. CATRON: I object to all of the papers as irrelevant and immaterial, as not the best evidence, and that no foundation has been laid.

JOHN D. BRYAN, a witness called and sworn on behalf of the respondants, testified as follows:

On examination by Mr. NEWCOMB:

Q. What is your name and residence?

A. John D. Bryan. I reside at Las Cruces.

Q. What official position, if any, do you occupy?

A. I am register of the United States land office in that district.

Q. Are townships 23, 24, and 25 south, ranges 1, 2, and 3 east, in your land district?

A. Yes, sir.

Q. Have you in your custody, as such officer, plats of townships 23, 24, and 25, ranges 1, 2, and 3 east?

A. Yes, sir; I have them.

Mr. NEWCOMB (after consultation): To save time, Mr. Bryan, will you please make out and properly certify an abstract of all the entries made under the public land laws of the United States in townships 23, 24, and 25, in ranges 1, 2, and 3 east, in order that it may be filed and considered as a part of the evidence for respondants in this case?

A. Yes, sir.

Mr. CATRON: I have no objection to that, but I wish to enter an objection to this testimony and abstract as irrelevant and immaterial.

WILL M. TIPTON, a witness called and sworn on behalf of the respondants, testified as follows:

89 On examination by Mr. BURKHART:

Q. What is your name and residence?

A. My name is Will M. Tipton, and my residence is Santa Fé, New Mexico.

Q. Do you understand the Spanish language, Mr. Tipton?

A. Yes, sir.

Q. What has been your experience in the study of the Spanish language—what experience have you had?

A. Experience extending over some nineteen years; during my connection with the office of surveyor general for the greater portion of sixteen years; since then in the position which I now occupy, as special agent for the court of private land claims detailed for duty in the office of the United States attorney for that court.

Q. Look at this paper (handing witness paper containing articles 2 and 4 of the law of January 4th, 1823) and state whether or not

the translation contained therein is a correct translation of the Spanish there written and if you made the translation.

A. That portion of this document described as article 2 I think I translated, but the word "executive" I do not recollect having translated.

Q. Is that translation correct of this article?

A. Yes, sir (examining). I don't think it is in one respect.

Q. What is the correct translation of it?

A. I would leave out the words "to them" if I were translating it, according to the Spanish as here written; there may be something in the text which would justify it, but I see nothing here in this article.

Q. Examine this document, archive No. 1107, introduced as Defendants' Exhibit No. 5, and translate the second article and change the printed translation to conform to it.

A. "Art. 2. In order to facilitate their settlement the governor will distribute lands under the conditions and in the terms that shall be expressed."

90 Q. Now, Mr. Tipton will you please look at article 4 of the Iturbide law (of January 4th, 1823), introduced as Defendants' Exhibit No. 5, and state whether you made the translation contained in this paper and marked Defendants' Exhibit No. 6?

A. I would like to see the text from which I made that translation. (After examining:) The word "lands," which appears in next to the last line, I have changed to "land," to agree with the original. In other respects I believe the translation is correct.

Mr. BURKHART: I now offer in evidence Defendants' Exhibit No. 5 as corrected by witness W. M. Tipton and the translations of articles 2 and 4 of the law of January 4, 1823.

(Which said translations of articles 2 and 4 of said law were marked Defendants' Exhibit No. 6.)

HENRY O. FLIPPER, a witness called and sworn on behalf of the respondants, testified as follows:

Examination by Mr. BURKHART:

Q. What is your name?

A. Henry O. Flipper.

Q. Do you understand the Spanish language?

A. I do.

Q. What experience have you had in the study of Spanish?

A. I studied Spanish at the United States Military Academy at West Point, beginning in 1874, and have been a student of it ever since, with twelve years' experience in the survey of public lands in Mexico, and have had to use the language all the time in that work.

Q. Archive 410 introduced in evidence here—have you made a translation of that document?

A. I have, sir.

Q. Is the translation contained in this printed document (refer-

ring to printed document filed in case No. 59 and contain- Defendants'
91 fendants' Exhibits 2, 4, 5, 6, 7, 8, and 9) the translation which you have made?

A. Yes, sir. The translation of this document (referring to archive 410) made by me begins on page seven and the second one on page 26 (referring to Defendants' Exhibits 9 and 2 respectively in the printed document last referred to).

Q. This translation is correct?

A. Yes, sir.

Q. Now, Mr. Flipper, will you look at page 176 of the "Codigo de Colonizacion y Terrenos Baldios," published in the city of Mexico in 1893, and state whether or not you have translated the law on that page numbered 47?

A. I have translated that law.

Q. Is the translation contained in Defendants' Exhibit No. 8 made by you?

A. Yes, sir; it is the translation made by me.

Q. Is it correct or not?

A. It is correct.

Q. Mr. Flipper, look at page 634 of volume 1 of "Legislacion Mexicano," printed in Mexico in 1876, No. 321 on said page, and state whether or not you have made a translation of the same.

A. I have, sir.

Q. Look at paper marked Defendants' Exhibit No. 7 and state whether or not that is a correct translation of articles 1 and 2 of that law and whether it was made by you.

A. Yes, sir; that translation was made by me, and it is correct.

Cross-examination by Mr. CATRON:

Q. You don't make any mistakes in translations, do you, Mr. Flipper?

A. Sometimes I do.

WILL. M. TIPTON, witness, recalled.

Mr. BURKHART:

Q. Mr. Tipton, examine this paper marked Defendants'
92 Exhibit No. 3 and state whether or not you have made a translation of the same.

A. Yes, sir; I have.

Q. Is that the translation made by you; and, if so, is it correct?

A. It is the translation which I made of such portions of the document handed me as were in Spanish—the latter part of the document was in English—and I believe it to be correct.

Q. That is marked Defendants' Exhibit No. 4, is it, Mr. Tipton?

A. The translation—yes, sir.

Mr. SPRINGER: I believe that is all the documentary proof we have to offer except the list of entries by the register of the land

office, and he may not get that finished this afternoon, but we will file that as soon as it is completed.

Mr. CATRON: This paper—No. 4—which has been introduced by Mr. Tipton, we wish to save an objection to it and all of this testimony which has been introduced.

PEDRO MELENUDO, a witness called and sworn on behalf of the respondants, testified through the medium of the official interpreter as follows:

Examination by Mr. NEWCOMB:

Q. What is your name?
A. Pedro Melenudo.
Q. Where do you reside?
A. Las Cruces, New Mexico.
Q. What is your age?
A. I was born in the year '10.
Q. You mean 1810?
A. Yes.
Q. Where were you born?
A. In El Paso.
Q. In El Paso, Mexico?
A. Yes, sir.
Q. How long have you lived in New Mexico?
A. Since the year '42.
Q. Where did you first come in New Mexico?
93 A. There to the Dona Ana grant.
Q. Have you lived in that vicinity ever since?
A. Yes, sir; I was working when they made the ditch; I helped to make the ditch.
Q. Do you know a tract called the Bracito?
A. Yes, sir.
Q. Did you ever live upon that tract of land at any time?
A. Yes, sir; I was there for the space of three months. When they run Don Antonio Garcia from there I was there with my father, herding some sheep.
Q. About how old were you when you first went with your father?
A. I might have been fourteen years old.
Q. Can you remember anywheres near the year?
A. I think it was in the year 1822.
Q. Now, you say you and your father went there working for whom?
A. Don (or Juan) Antonio Garcia.
Q. Where was he at that time?
A. He used to go there to the ranch.
Q. Whereabouts was this ranch you have described; how far from El Paso?
A. It was here below the place of the boundary line of the Dona Ana grant; somewhat below.

Q. What was there there to make that place where he says the lands of Dona Ana extended; was there anything there?
A. A place by which the river passes.
Q. Was there anything taken out from there; any acequia?

Mr. CATRON: I object to the question as leading.
Question withdrawn.

Q. Had Garcia done anything there at that place in the way of improvements of any kind?
A. Just the ranch; he only had a ranch there.
Q. Any water taken out from there; any streams?

Objected to as leading. Overruled.

94 A. No.
Q. Was there any ditch there?

Objected to as leading. Overruled.

A. There was none at that time; no ditch.
Q. Does he know anything of a ditch on the Bracito tract at any time?
A. No, sir; at the place called Canoncito there was a ditch taken out by Antonio Bunavides and others.
Q. When was that?
A. About the year 1814.
Q. When you were on the ranch there you say you were herding animals?
A. Yes, sir.
Q. Did you go there to live?
A. No; because the Indians were causing us a great deal of harm; the Indians made a great deal of trouble at that time.
Q. After the Indians drove you away where did you go to?
A. I came to the grant of Dona Ana.
Q. You say you went to the grant of Dona Ana in 1842?
A. I say about.
Q. From the time you were born up to 1842, with the exception of the three months you lived on the Garcia ranch, where did you live?
A. In El Paso, Mexico.
Q. Now, during the time you lived in El Paso, Mexico, at any time did any number of people, of Americans, come to that place or up to the Bracito grant, during any of those years?

Mr. CATRON: We object; no proper foundation has been laid for such a question.
By the COURT: He may ask it. Objection overruled.

A. I did not see any; I did not know anybody but the Americans who lived in El Paso, and they were known people.
Q. Then do I understand you to say that there was no colony of Americans ever come to El Paso and up to the Bracito tract of land at any time that you lived in El Paso?

Mr. CATRON: Objected to, no foundation having been
95 laid, and as incompetent and leading.
Overruled.

A. There were none; no, sir.

Q. Now, in 1825 or 1825 did any colony of Americans come to El Paso and bring with them machinery and implements of husbandry and all that kind of things? Did they come to El Paso or go to the Bracito?

A. There was no such colony there.

Mr. CATRON: We object to this; there has been no foundation laid for such testimony.

Objection overruled.

Q. There was no such colony there?

A. No, sir; I saw no families at the time when I used to travel up to the colony of Dona Ana.

Q. Now, I am talking about the time when you lived upon the Bracito tract with your father; now answer the question, Did any colony of Americans come there with machinery or implements of husbandry?

Mr. CATRON: Objected to for the same reasons as the last question.

Objection overruled.

A. No, sir; I saw no one.

Q. (To the interpreter:) You don't put the question as I ask it. Ask him whether he ever saw any such colony of American people come to the rancho on the Bracito tract during the years '22, '23, '24, or '25.

A. No, sir.

Q. Did you ever hear during those times talk about people or any such colony having ever been in that country?

A. There was no other grant except Dona Ana.

Q. Did you ever hear amongst the people when you lived there of a colony of American people going there during those years from the United States?

96 A. No, sir; we did not know of any of those persons coming in there.

Q. Never heard of any colony coming there?

A. In 1846 many Americans come in.

Q. Before 1846 did you ever hear of any number of Americans coming into the country?

A. No, sir.

Q. Before 1846 do you know how many Americans were down in that country, about, at El Paso, Bracito, and all around?

A. There were only three in El Paso.

Q. Before the settlement of Dona Ana, in 1842, were there any people living between El Paso and the Dona Ana settlement; and, if so, how many?

A. No, sir; only a man named Benevides, who had a wooden house.

Q. Where was that house of Benevides?
A. It was right at Canontio.
Q. Were there any Americans living in that country from Dona Ana to El Paso—any Americans living there during the years '23, '24, '25?
A. No, sir; only those three; Mr. Stevens was one of them.
Q. Did you know the others?
A. There was Don Jose and the other was Mr. Mike.

Cross-examination by Mr. CATRON:

Q. You say you were born in El Paso?
A. Yes, sir.
Q. On which side of the river?
A El Paso, Mexico.
Q. What was Don Jose's name, if he had any other?
A. He was called Don Jose only.
Q. Any relation to Mr. Stevenson?
A. Yes, sir.
Q. What relation?
A. I believe he was married to a cousin of his.
Q. Did you know a man down there by the name of Carleau?
97 A. No, sir; I did not know him.
Q. Did you know a man there by the name of Duncan?
A. No, sir.
Q. Were you acquainted with the wife of Horace Stevenson?
A. The wife of Esteban Stevenson?
Q. Horatio Stevenson.
A. Yes, sir.
Q. You knew her?
A. Yes, sir; very well.
Q. Did you know her father?
A. Yes, sir. He was Don Esteban Stevenson.
Q. Did you know Price Cooper?
A. No, sir.
Q. Where did you live in the year 1825?
A. El Paso.
Q. Where did you live in the year 1835?
A. El Paso.
Q. Where did you live in the year 1845?
A. Donna Ana.
Q. You say that you herded sheep in 1822, and that the Indians run you off?
A. Herded cows.
Q. And the Indians run you off?
A. Yes, sir; they drove off all of us.
Q. And stole the stock?
A. Yes, sir; and drove them off.
Q. How many people did you have on that ranch when you were herding those cattle?

A. Myself, my father, Juan Ortega.
Q. And you say when the Indians run you off you went upon the Dona Ana grant?
A. Yes, sir.
Q. Who was living at Donna Ana after the Indians run you off?
A. Don Pablo Melendres, Jose Maria Portales, Gregorio Portales.
Q. Is Don Pablo Melendres the one that is here now?
A. No, sir; his father.
Q. Did you ever know his father?
A. Yes, sir.
Q. You say at the time the Indians run you off you went to his ranch with your father?
A. Yes, sir.
Q. You were on this Bracito tract but one time, and that
98 was for three months, was it?
A. Yes, sir.
Q. Now, after the Indians run you off with your cattle and you went to Donna Ana, how long did you stay there?

Mr. NEWCOMB: I object to the question. The witness did not say that, and he is misleading the witness.
Objection overruled.

A. All the time until we dug a portion of the ditch.
Q. And you have been there practically up to this time, have you?
A. Yes, sir.
Q. Where were you when the American troops passed by Donna Ana the first time?
A. There in Donna Ana, because Don Pablo was ordered to assemble all the people there by the man Mr. Thomas, and about eight o'clock we all assembled and took the oath of allegience to the United States.
Q. How long had there been a Mexican garrison at Donna Ana?
A. For about three or four months.
Q. Are you acquainted with Horace Stevenson, of Donna Ana county?
A. Yes, sir. I knew his father.
Q. How old was Horace Stevenson when you went away from El Paso?
A. He might have been four years old.
Q. Do you know how old he is now?
A. No, sir.
Q. Is he as old as Judge Newcomb?
A. I think so.
Q. Did you know Henry Curleau?
A. No, sir.
Q. Did you know a man down there by the name of Blanchard?
A. I did not know him.
Q. Did you know Henry Gig?
A. No. I knew Luis Guique.
Q. When did you first know him?

A. There in Donna Ana, when a detachment of troops was sent there.

Q. Where were you when the battle took place between the American and Mexican troops at Bracito?

A. At Donna Ana.

99 Q. Were you a married man then?

A. Yes, sir.

Q. Where did you marry?

A. El Paso.

Q. How long had you been married at that time—when the battle took place at Bracito between the Americans and Mexicans?

A. It might have been four years.

Q. Who did you marry?

A. A widow woman.

Q. What was her name?

A. Manuela Hidalgo.

Q. How old was she when you married her?

A. 18.

Q. In what year did you marry?

A. '41.

Q. How old was you when you married?

A. 30.

Q. Have you any children?

A. I have one very old; fifty-three years old.

Q. How many children did you have?

A. 10.

Q. Gregorio Herrera. Did you know him?

A. I knew him.

Q. Is he living or dead?

A. I think he is living.

Q. How long since you were in El Paso?

A. It is twenty years. I have not gone to El Paso.

Q. How many times have you been to El Paso since you went to Donna Ana to live?

—. I went there many times, bringing provisions for my family.

Q. About the year- 1822, '23, '24, when you were herding those cattle and for a few years thereafter, the Indians were very bad along there, were they not?

A. Yes, sir; they even carried people off and killed stock.

Q. People then didn't travel much back and forth, did they, from El Paso to Donna Ana?

A. Only in parties of ten or twelve or more.

Q. It was very rare if anybody went along there then?

A. No, sir; there used to be nobody that went along there that was not killed by the Indians.

100 Q. Didn't dare go alone?

A. No, sir. We used to pass through with the carts (caretas) in parties of 10 or 12.

Q. What was the first time you went by the Bracito, on which you had your ranch, after the Indians run you off?

A. I think I went by in '46 or '48.

Q. That was the first time after the Indians run you off?
A. Yes, sir.

Re-examination by Mr. NEWCOMB:

Q. When you say the Indians run you off what place do you refer to?
A. El Paso.
Q. They run you down to El Paso?
A. Yes, sir.
Q. How long did you remain there before you went away?
A. In El Paso?
Q. Yes.
A. Until the time they commenced to take steps to place the Dona Ana grant.
Q. That was the first time you left El Paso after the Indians run you off?
A. Yes, sir.
Q. Do you remember anything about Emperor Iturbide?
A. Yes.
Q. Do you remember when the——

Mr. CATRON: Wait, now. Do you want to testify for him? If so, ask the court to allow you.
The COURT: Proceed.

Q. Do you remember when he was dethroned?
A. Yes, sir.
Q. Where were you then?
A. El Paso.
Q. How many Americans were there then?
A. There were none then except Don Esteban Stevenson.
Q. Do you remember the revolution when Mexican got her independence?
A. I do remember.
Q. Do you remember when the Spaniards left?

101 Mr. CATRON: I object. He has not said there were any Spaniards around there.
Objection overruled.

A. Yes, sir; I remember, because there were some Spaniards that remained there.
Q. How many?
A. Don Francisco Valverde, Alex. Ramirez, Juan Gil, called Moyete, and also Don Pilar Laso.
Q. That was about all the Spaniards that were left when the others went away?
A. Yes, sir.
Q. You say you remember when Iturbide was deposed?
A. Yes.
Q. When had you been living the three months on the Garcia ranch, before or after that?

Mr. CATRON: Objected to as leading.
Overruled.

A. I had not been living at the ranch. I was at El Paso still.

Recross-examination—Mr. CATRON:

Q. Where were you when Hidalgo was killed?
A. El Paso.
Q. You remember that very*b* well, do you?
A. Yes, sir.
Q. About how old were you at that time?
A. About six years.
Q. Do you remember it very distinctly when Hidalgo was killed?
A. I remember it very well.
Q. Who else was killed at the same time?
A. I do not remember any other now.
Q. Where was Hidalgo killed?
A. Here towards Mexico.
Q. Towards El Paso or towards Santa Fé?
A. Towards Chihuahua.
Q. At the time you say you were herding cattle was there any Stevenson living in El Paso?
A. He was living in El Paso.
Q. Don't you know that Mr. Stevenson went to El Paso to live in 1828?
A. I don't think so. He was there, married.
Q. It was about five or six years after Iturbide was killed that you were herding sheep there, was it not?
A. Yes, sir.
Q. That's all.

Court adjourned until tomorrow at 10 o'clock.

102 THURSDAY MORNING, *June 20th*, 1895, at 10 o'clock a. m.

Court met pursuant to adjournment.
In this cause the following proceedings were had:

SAMUEL G. BEAL, a witness called and sworn on behalf of the respondants, testified as follows:

Examination by Mr. NEWCOMB:

Q. What is your name?
A. Samuel G. Beal.
Q. Where do you reside and what is your age.
A. Las Cruces; I am seventy-five years old.
Q. When did you first come to this country?
A. I came first to Santa Fé in 1846, and I next went down in the southern part of the Territory with Col. Daffries' regiment.
Q. Where did you go to? In what part of the country did you go?
A. To Mexico and Chihuahua.

Q. Between here and Chihuahua did you have any battles?
A. We had the first battle about ten miles below old Fort Fillamore, Donna Ana county, at what is called the Bracito ranch, or Partido de Bracito is what it is known by.
Q. About how long were you in El Paso?
A. Forty days.
Q. During that time did you see or become acquainted with any American residents in that section, if there were any?
A. I believe I saw Americans around there.
Q. How many?
A. Very few.
Q. Those that you saw there, do you remember any of them?
A. There were so few there when I first went there in 1846 that I can't recall the names of any of them.
Q. When did you come back from Mexico?
A. We didn't come back that way. We went to New Orleans and were discharged there.
Q. When did you next go down to El Paso?
A. In 1848.
Q. Have you lived in this country ever since?
A. Off and on.
103 Q. Have you at any time held any position in the county of Donna Ana?
A. I have been sheriff of Donna Ana county.
Q. About what years?
A. From '53 to '61—eight years.
Q. Are you well acquainted with the people of that country and vicinity in the county of Donna Ana?
A. I used to know them all—very nearly all.
Q. Did you know a man by the name of Cooper?
A. I did know Price Cooper.
Q. When did you first become acquainted with him?
—. The first time I recollect seeing Price Cooper was when he was living in a house on what is called the Canontio ranch down there, about fifteen to eighteen miles above the present town of El Paso. It was Bonee's ranch then.
Q. You say eighteen miles this side of El Paso?
A. Somewhere along there; 12, 15, 18 miles.
Q. What was he doing there?
A. Held that land for McDuffy.
Q. About what year was that?
A. '48 or '49.
Q. Now describe about how old Price Cooper was at that time.

Mr. CATRON: Objected to as hearsay and incompetent.
Objection overruled.

A. Price Cooper looked rather boyish to me at that time—rather boyish appearance, and I considered him younger than myself.

Mr. CATRON: Objected to as incompetent and irrelevant and not the proper way to prove such facts.

Q. Can you describe his looks at that time as to appearance?

Mr. CATRON: Objected to for the same reasons.
Admitted subject to the objection.

A. He was a fellow of small statute and boyish appearance. That is about *is* description.

Q. Do you know how long he lived upon that ranch?

A. I don't remember; good many years he lived there, but he was driving a stage afterwards, El Paso to Santa Fé.

104 Q. When was that?

A. Along in the '50's—the early '50's.

Q. Do you own any property down in the Mesilla valley there?

A. Yes, sir.

Q. About '48 or '49 what condition was that country in as to people being able to travel through?

A. The Indians were dangerous—all the time dangerous.

Q. How did people travel when they made big journeys?

A. The Mexicans use to travel, by twenties and armed, from the town of Dona Ana to El Paso.

Mr. CESSNA: Objected to as incompetent, irrelevant, and immaterial.
Objection overruled.

Q. State what settlements there were in that country at that time.

A. There were no settlements from the town of Dona Ana to a place called Ponee's ranches then, and from there to El Paso—no settlements except one, and that was in '48 and '49, and in '46 there was none. There was one house eight miles above built by a man names White—above El Paso.

Q. Were there any public conveyances running at those times? 1846 I am talking about.

Mr. CATRON: Objected to for the same reasons. Witness has not shown any capacity to testify on that subject. He went down there in 1846 with soldiers. It is impossible for him to have known the condition or conveniences of the country.
Objection overruled.

A. The stage line started after the line between the United States and Mexico was surveyed.

Q. Mr. Beal, did you ever hear from the time you have come to that country until now, from the inhabitants or anybody, of any such grant as Juan Heath grant in that country?

Mr. CATRON: Objected — for the same reasons.

105 Objection overruled.

A. I never heard of that grant until 4 or 5 years ago, I think; before that time I never heard of it.

Q. You never heard it talked about by any of the inhabitants?

Mr. CATRON: Objected to as leading.
Question withdrawn.

Q. What was there known there as to the title to that land? Were there any grants issued by the Mexican government for that land at that time?

Mr. CATRON: We object. That is not the best evidence.
Objection sustained.

Q. Mr. Beal, did you ever hear from the inhabitants of that section of the country anything of a colony of Americans having come to that country in 1824—fifty or a hundred of them?

Mr. CATRON: Objected to as incompetent, irrelevant and immaterial, and as hearsay.
Objection overruled.

A. No, sir.
Q. If such a colony had come down there, it would have been known by the whole country there?

Mr. CATRON: It occurs to me that the judge is making himself a witness. I object to the question as leading.
Objection sustained.

Cross-examination—Mr. CATRON:

Q. Where is Canontio from the Bracito tract of land—from the place where you had the battle?
A. That country has been changed down there some. I will have to calculate the distance from Las Cruces and deduct——
Q. You say Canontio is about ten miles above El Paso?
—. ——.
Q. Ft. Fillamore is about how far from Las Cruces?
A. About six miles.
106 Q. You say the battle was about ten or twelve miles below Fort Fillamore?
A. Yes, sir.
Q. That would make it six or eight miles below Las Cruces?
A. Yes, sir; I am not good at measuring, myself.
Q. I understand you are giving it to the best of your knowledge?
A. I should say it is about that distance, more or less.
Q. About forty-eight or fifty miles from Las Cruces to El Paso, isn't it?
A. We all call it fifty miles; I believe the railroad makes it less than that.
Q. That would make it sixteen or eighteen miles from the battle ground to Canontio, wouldn't it?
A. Not that much.
Q. About how much, then?
A. What's the question?
Q. (Question repeated and Mr. Catron added:) From El Bracito to Canontio.
A. Yes, sir; about that.
Q. How long did you say you stayed in El Paso after reaching there on the raid down to Mexico?

A. I think we stayed about forty days.
Q. How many men did you have?
A. Seventy-eight hundred officers and men.
Q. That was rather an unusual thing, your going down there on that occasion?
A. Yes, sir.
Q. Attracted considerable attention?
A. From whom?
Q. From the people generally.
A. We might have attracted some attention.
Q. You were on the lookout for the enemy all the time, were you?
A. Yes, sir; we were looking for them.
Q. You had pretty strict discipline around there?
A. Yes, sir.
Q. What did you do in El Paso?
A. Took quarters there.
Q. The soldiers were pretty generally kept in quarters?
A. Yes, sir; we had camp guards and picket guards out.

107 HENRY J. CUNILLE, a witness called and sworn on behalf of the respondants, testified as follows:

Examination by Mr. NEWCOMB:

Q Where do you reside?
A. Las Cruces.
Q. What is your age?
A. I will be sixty-nine years in August.
Q. What positions, if any, have you held in the county of Donna Ana?
A. I have been assessor, sheriff, and probate judge.
Q. When did you first come to this country?
A. In 1845.
Q. To what place did you come?
A. Santa Fé.
Q. How long did you live here?
A. I stayed here until spring and then went back, and kept going back and forth.
Q. When did you go down to the lower country?
A. I went down there in the winter of 1847.
Q. Did you become well acquainted with the people down in that section of the country?
A. I did.
Q. At that time were there any Americans down there?
A. Yes.
Q. Can you name them?
A. In the vicinity of Donna Ana.
Q. Yes, and El Paso.
A. Well, there was Frank Fletcher, Henry Curleau, Lucas Curleau, Jim Buchanan——

Mr. CATRON: This is all objected to as immaterial and irrelevant and as having no bearing whatever on the case, and we wish all that character of testimony to be considered as objected to.

No ruling.

Q. Did you become acquainted with all of the Americans living down there?

A. I think I did.

Q. You have lived in that country ever since?

A. Off and on; yes, sir.

Q. That has been your residence?

A. Yes, sir.

Q. Did you know one Price Cooper?

A. I did.

108 Q. When did you first know him?

A. Well, it was about '50, beginning in '50. He was driving a mule wagon from Santa Fé to San Antonio.

Q. Did you ever hear of him in that country in 1847 when you went there in 1847?

Mr. CATRON: Objected to, as no foundation has been laid.

A. In the winter of 1847 I was in Donna Ana.

Q. What I asked you was whether you have ever heard of him being there before 1850.

Mr. CATRON: Objected to as incompetent and immaterial.

A. I might have heard of him, but I didn't see him until he was driving a mule team from Santa Fé to San Antonio.

Q. How old a man was he at that time?

Mr. CATRON: Objected to as incompetent.

A. He was a little older than I was; probably three or four years.

Q. What was his appearance as to age?

A. He was a red-faced, round, healthy-looking young man.

Q. When did you see him last?

A. I have not seen him for about eleven years.

Q. You say he was a man three or four years older than yourself?

A. Yes, sir; not more than five.

Mr. CATRON: Objected to as incompetent and as no foundation has been laid.

Q. You have purchased land in the Mesilla valley and dealt in that somewhat?

A. Yes, sir.

Q. Did you ever hear of a grant in that section of the country called John Heath or Juan Gid grant?

Mr. CATRON: That is objected to as incompetent and immaterial.

No ruling.

109 A. I have heard it in the newspapers in the last four or five years.

Q. Before that did you ever hear it talked about in that community by the old people?

A. No, sir.

Mr. CATRON: Objected to as incompetent and immaterial and hearsay.

No ruling.

Q. Did you ever hear of anybody there claiming lands under that title?

Mr. CATRON: Same objection as to the last question.

No ruling.

A. No, sir.

Q. Did you ever hear from the old inhabitants or any one else of a colony of Americans ever coming to the Bracito or El Paso along in '20's, '22, '3, or '4?

A. No, sir; I never heard of it.

Mr. CATRON: Same objection.

No ruling.

Q. What was the condition of the country when you first went there as to safety of travel and communication?

A. Wild.

Q. How did people travel in those days?

A. Got together and traveled in that way.

Cross-examination by Mr. CATRON:

Q. You have been down there for the last twenty years?

A. Yes, sir.

Q. How long since the railroad come in?

A. I think about seven years.

Q. About that time didn't you hear the title to the John Heath grant talked about?

A. I haven't paid no attention about the railroad coming in there.

110 Q. Didn't you hear this title talked about then?

A. No, sir; the first time I ever heard it talked about was in the newspapers a few years ago.

Q. Didn't you know that people had a claim on file for that land ten or twelve years ago and were asserting title under the John Heath grant?

A. I have not heard of it.

Q. The first time you went to Donna Ana county was in 1847?

A. Yes, sir.

Q. Where did you live?

A. Donna Ana.

Q. How long did you remain at the town of Dona Ana?

A. I was there about six months. I stopped there about five or six months.

Q. Where did you go to from there?
A. Las Cruces.
Q. How long did you remain there?
A. I took a trip to California in 1852, and that has been my residence ever since.
Q. Are you acquainted with Horace Stevenson?
A. Yes, sir.
Q. Do you know anything about when he first went to that country?
A. Not positively; only from hearsay.
Q. Did you ever see him when you went there?
A. I have heard others say he went there in 1838, I think.
Q. Do you know when Henry Curleau went there?
A. He went about the same time Stevenson did.
Q. Did Mr. Duncan, the father of Mrs. Stevenson—did you know him?
A. Yes, sir.
Q. Do you know when he went there?
A. Stevenson, Curleau, and Duncan, all those people all went there about the same time.
Q. Stevenson, that is the father of the present probate clerk of Donna Ana county?
A. Yes, sir.

Re-examination by Mr. NEWCOMB:

Q. About how many people are there living down there in the Mesilla valley now?

111 Mr. CATRON: Objected to as not the best evidence.
Ov*h*ection overruled.

A. I can't tell exactly; about six or seven thousand.
—. Don't you think there is eight thousand?
A. There may be eight thousand. I never paid any attention.
Q. From the time you went to Donna Ana, in 1847, you have lived in Las Cruces ever since. Now, as to the population, how many people are there?
A. About six thousand in Donna Ana and Las Cruces and the ranches around.
Q. At the time you settled how many were there?
A. They were settled close to the town and I don't suppose there was one-third of that.
Q. Why did they settle close to the town?
A. On account of the Indians.
Q. How did they cultivate their lands those days?
A. They lived in town and went out armed together in the fields.

Mr. CATRON: Objected to as incompetent and irrelevant.
No ruling.

Q. Now, in Mesilla, how many people are there living there?

A. I have estimated—that estimate takes the population up to San Miguel. Take them to San Miguel, I suppose there are 5,000 people.

Q. Now, in those days how did people make their living, generally?

A. Farming.

Q. From 1847, when you went there, up to the present time, state whether or not continuous settlements have been formed there.

Mr. CATRON: Same objection.

A. Yes; they have been going on.

Q. The settlement there has been continuous?

A. Yes, sir.

Recross-examination—Mr. CATRON:

Q. You say that in Donna Ana and Las Cruces there are
112 6,000 people?

A. On the Mesilla grant there are about 5,000 people.

Q. There are some people in Donna Ana county below Mesilla?

A. Yes, sir.

Q. There are other people down there?

A. Yes, sir.

Q. And there are some people on the other side of the river, further below?

A. Yes, sir.

Q. And there are some people in Donna Ana county towards La Luz, Col.?

A. Yes, sir.

Q. Has there not been a great increase in that county since 1890?

A. It has been increasing all the time.

Q. How many votes were cast in the precinct of Donna Ana at the last election?

A. I could not say.

Q. Do you know how many votes were cast at Las Cruces, in the two precincts?

A. I don't know.

Q. In the precinct of Mesilla?

A. I don't know.

Q. Do you know how many were cast in Santa Tomas?

A. Do you say votes? I do not know how many votes were cast in any one precinct.

Q. Do you know how many votes were cast in the whole county?

A. No, sir.

Q. You hav-n't much idea, than, of the population of any of that country down there?

A. Only by traveling back and forth, but I do not know how many there are in any one precinct.

Examination by Mr. FISKE:

Q. You have described several settlements down there. State whether or not there was an old settlement on the Garcia grant, the Barcito grant.

A. There were some old shanties there that the Garcias lived in.

Q. It has been an old and continuous settlement, has it?

A. They lived there some time, and also at a place called Amolis; that is on the grant also. They lived there many years; I
113 don't — how long they lived there.

Q. You refer to the same grant—of Hugh Stevenson?

A. Yes, sir.

Q. The settlement there has been continuous, has it?

A. I don't remember when the Garcias left.

Q. That is considered one of the old settlements down there?

A. Yes, sir.

GEORGE ACABAC, a witness called and sworn on behalf of respondants, testified as follows:

Examination by Mr. NEWCOMB:

Q. What is your age and residence?

A. I am seventy-six years old, and live at Donna Ana.

Q. When did you first come to this Territory?

A. I come to Donna Ana in 1848 with the 8th company of dragoons under General Sackett.

Q. Where have you lived since that date?

A. Pretty near all the time in Donna Ana. I have been away two or three times.

Q. You have lived practically all the time on your ranch in Donna Ana?

A. Yes, sir.

Q. When you got to Donna Ana in 1848 did you settle?

A. Yes.

Q. What was the condition of the country then and for a great many years afterwards as to the safety of the inhabitants?

A. People couldn't travel with any safety unless they assembled in big armed parties, unless they run a great deal of risk, and many were killed in those days.

Q. Did you get well acquainted with the people in that country?

A. Yes, sir.

Q. All the people around there?

A. Yes, sir.

Q. Did you ever hear anything about a grant called the John G. Heath in that community?

A. Not until here lately.

114 Mr. CATRON: Objected to as incompetent, irrelevant, and immaterial and as having no bearing onn this case.

Objection overruled.

Q. What grants in any were known by the people there?

A. The Dona Ana grant and the Stevenson grant were about all that I heard much about.
Q. Did you know Price Cooper?
A. Yes, sir.
Q. When did you first become acquainted with him?
A. In '48.
Q. Where?
A. Mear Donna Ana, on the road traveled by us.
Q. How old a man was he at that time?

Mr. CATRON: Objected to, as no foundation has been laid and as immaterial.
No ruling.

A. He appeared to be a man about my own age at that time; we appeared to be about the same age.
Q. Describe his looks.
A. He was a small, round-faced man, red-faced, dark-complected, and was a heavy-set man.
Q. Can you state now from his appearance whether he could have been any older than you; and, if so, how much?
A. I might answer. He probably might have been a year or two older; I don't think he could have been any older than that from his appearance, to the best of my knowledge.
Q. Do you know where he was living at that time?
A. He was on the road at that time with Scimmer; that was the agent.
Q. Did you ever hear of a colony of Americans going to El Paso or to the Bracito grant in 1820, '22, '23, or '24?
A. I have never heard anything of the kind until here lately.

Mr. CATRON: Object to the question and answer, as no foundation has been laid, and as incompetent and immaterial.
No ruling.

Q. Did you ever hear of any person claiming land in that valley under what was called the John Heath Colony grant?
A. Never.

115 Cross-examination by Mr. CATRON:

Q. You don't pretend to know much about what was there before you went there, do you?
A. No, sir, of course not; only from the looks of the country, and the people give one a pretty good idea.
Q. This fellow Price Cooper was a pretty well preserved man?
A. He must be.
Q. When you first saw him?
A. Yes, sir; he was a good fellow, brown and hearty.
Q. Good looking?
A. I don't know; if he had not been so brownish and rusty looking he would have been handsome.
Q. Looked about your age. Were you handsome?
A. I was called the beauty of the country.

Q. Wasn't he a good-looking man when you first saw him?
A. Yes.
Q. You were simply jealous of Price Cooper and was afraid he would get ahead of you?
A. Far from it.
Q. You have never lived in El Paso?
A. No, sir.
Q. How far is the place where you lived from El Paso?
A. It is always called 48 or 50 miles.
Q. You say a long time after you went down there the Indians were very dangerous?
A. Yes, sir.
Q. People didn't travel about much?
A. No, sir.
Q. But stayed at home?
A. Yes, sir.
Q. Didn't know much about what was going on in the balance of the world?
A. We would hear occasionally.
Q. You didn't know what was going on in those days in the balance of the territory?
A. No, sir.

By Mr. FISKE:

Q. You kept pretty well posted within forty or fifty miles, didn't you?
A. Yes, sir; about who owned land and who cultivated and who lived there.
116 Q. Pretty well posted about the Stevenson grant, for instance?
A. Yes, sir; I took some of those lands myself.

PABLO MELESDRES recalled for further examination.

By Mr. FISKE:

Q. You live in Donna Ana; when did you go there to live?
A. In 1843.
Q. You have lived there ever since?
A. All the time.
Q. State whether or not the settlement made there in 1843 has been continuous and the people have lived there ever since or not.
A. Yes, sir.
Q. What industry do the people there follow for a living?
A. Farming; generally all of them.
Q. Under what conditions did they have farms there in the early days?
A. In the early days the people would organize in different divisions. If there were sixty men thirty would go out and work in the forenoon, and then the other thirty would remain in the place and protect the families, and then they would change.

Q. Don Pablo, did you ever hear of the people there — anything of a grant extending over that country called the Juan Gid grant?

A. I have not known anything about this; I have always known of the grant which was called the Bracito grant, which was a grant that belonged to my grandfather, Don Antonio Garcia. That was the only grant but the Dona Ana.

Q. Do you know of any other in the vicinity?

A. The Dona Ana and the Mesilla.

Q. Was there anything known or heard of by the people you have lived with, and did you ever hear of an American colony ever coming to El Paso or Bracito along in the early 20's or at any time?

A. I never heard anything about this until Santiago McGuffin passed through Donna Ana.

117 Mr. CATRON: Objected to, as immaterial and irrelevant. No ruling.

Q. When did he pass through there?

A. I think he passed there between the years '44 and '45. He passed before the American troops passed.

Q. Was there ever anything heard of an American colony settling on the Bracito grant way back in '22, '23, '24, or '25; anything of that kind ever heard of?

Mr. CATRON: Objected to as the witness has already answered that.

A. Nothing was ever heard; only about the ranch of Don Antonio Garcia at that place.

Q. Hear anything about anybody bringing machinery, farming utensils, and so forth to that country back in '23, '24, and 25?

Mr. CATRON: Objected to for same reasons.

A. No, sir.

Q. Do you know of any claim ever being made for the land down there in the Mesilla valley under a grant called the Juan Gid.

Mr. CATRON: Objected to for the same reasons.

A. I did not know until about three or four years ago, when they were going for the recorder there in the county court.

Q. That was the first ever heard of it by the people, so far as you know?

A. That was the first ever heard of it by the people.

Cross-examination by Mr. CATRON:

Q. You were born in the year 1835?

A. In the year 1836.

Q. You don't know much about what took place prior to your birth, do you?

A. I know some from what my father told me.

Q. Of your own knowledge you don't know anything?

A. No, sir.

Q. You don't know anything that took place until ten years after you were born?

A. I know that.

118 Q. How old were you when the American troops passed through Donna Ana?

A. I was ten years already.

Q. You remember the circumstances?

A. Yes, sir.

Q. You say the Indians were very bad about that time?

A Yes, sir.

Q. People didn't travel around much?

A. Yes; they traveled.

Q. Not much?

A. Much.

Q. Go around with an escort?

A. About fifteen or twenty would assemble together with caretas (carts), and then they would make company for the parties.

Q. But that didn't take place very often?

A. Yes; it would al nost all the time.

Q. Excursions would go out every day?

A. No.

Q. Every week?

A. No; ever- month, at least.

Q. Where were you in 1823?

A. I don't know.

Q. Where were you in 1853?

A. Donna Ana.

Q. Where were you born?

A. El Paso.

By Mr. FISKE:

Q. After leaving El Paso did you go to Donna Ana?

A. Yes.

Q. How many years did you live in El Paso before going to Donna Ana?

A. I do not know how many years. I was born in 1836, and already had three brothers older than myself.

Q. Did you ever hear your father state where he lived prior to your birth?

A. Yes, sir.

Objected to. Overruled.

Q. Where did he say he lived?

A. In San Bartolo, below.

Q. How far is that from El Paso?

A. It is on the other side of Chihuahua; the other side of Santa Rosalia.

Q. How long had he been living in El Paso before you were born?

A. I do not know.

Q. From information which you have derived from conversations and statements from your father?

119 Mr. CATRON: Object to all such conversations as hearsay, no foundation has been laid, and as being absolutely irrelevant to any issue in this case.

Admitted subject to the objection.

A. From information, my father lived ten years before he was married in El Paso.

Q. Was he married in El Paso?

A. Yes, sir.

Q. And he lived in El Paso from that time until you went to Donna Ana?

A. Yes, sir.

Q. How long, how many years, after your father and mother were married were you born?

A. Six.

Mr. J. D. BRAYAN recalled for examination by Mr. Springer:

Q. Have you made that list of entries in the townships and ranges referred to in your former examination?

A. Yes, sir.

Q. Present it, please.

(Witness presents paper.)

Mr. SPRINGER: We offer that in evidence as Defendants' Exhibit No. 17.

(Which said document was marked Defendants' Exhibit No. 17.)

Mr. CATRON: I wish to object to that for the same reasons as stated in that part of the record referred to this same matter.

Admitted subject to the objections.

Defendants rests. Respondants rest.

Rebuttal for Petitioners.

Mr. CATRON: If the court please, as to the translations, I guess the court will determine without any evidence what is the correct translation, if necessary; here is the translation of the officer

120 translator, which it is not necessary to offer.

I offer certified copy of the record made by the town council in August, 1823, which is a grant for four thousand acres of land to Jose Lerma for himself and those who were to colonize with him, and the certificate shows the grant to have been held by him. This grant was made by the town council of El Paso, the same body which made this grant of John Heath.

(Said document was thereupon marked Exhibit "Y" for petitioners.)

Mr. SPRINGER: We would — to have an opportunity to examine this document before objecting to it specifically, but we offer an object-, based upon what Mr. Catron says, that it is incompetent and irrelevant and immaterial to this case, as (I see) also it is not prop-

erly attested, and as not bearing in any way upon the issues in this case.

Mr. CATRON: I also offer in evidence the confirmation of the Hugh Stevenson grant, to show the reservation therein as to this grant.

(Said document was marked Exhibit "Z" for petitioners.)

Petitioners rest.
Case closed. Argument followed.
Submitted June 22nd, 1895.

I hereby certify the above and foregoing fifty-five pages contain a full, true, and correct transcript of all the proceedings had in open court in the case of J. B. Cessna *et al. vs.* The United States, No. 59, on the records of this court.

LUMAN F. PARKER, JR.,
Stenographer Court of Private Land Claims.

October 21, 1895.

121 Be it further remembered that upon the trial and hearing of said cause before said court the following documentary proof referred to in the report of the official stenographer was introduced, to wit:

122 EXHIBIT A FOR PETITIONERS.

In the Court of Private Land Claims.

J. B. CESSNA *et al.*, Plaintiffs,
vs.
UNITED STATES *et al.*, Defendants. } Number 59.

It is hereby stipulated between the plaintiffs and defendants that the petition of Enrique Palmer, of St. Louis, Mo., may be taken before Thomas B. Harlan, a notary within and for the city of St. Louis and State of Missouri, without commission, the plaintiffs appearing by J. B. Cessna and the defendants appearing by Matt. G. Reynolds, U. S. attorney.

ENRIQUE PALMER, being first duly sworn, deposes as follows:

Q. Please state your name, age, residence, and occupation.
A. My name is Enrique Palmer; my age is about 59; I reside in the city of St. Louis, and I am an attorney-at-law.
Q. Where were you living in 1881 & '2?
A. In St. Louis, Mo.
Q. Had you ever any connection as a lawyer with the claim of Dr. John G. Heath to a Mexican land grant made by the Mexican government to said Heath in 1823 for a trac*k* of land situated on the Rio Grand river about 40 miles northwest of El Paso?
A. Yes; I have been connected with that matter; I think in 1882 or thereabouts.
Q. Who were associated with you?

A. A Mr. Mansfield, of New Florence, Mo., was associated with me in the prosecution of this claim; in fact, it was through him that I became connected with it.

Q. Was there some other lawyers associated in the same case beside yourself and Mansfield; if so, who were they?

123 A. After I was connected with it two or three years there were other attorneys, one Judge John O'Neil and R. W. Jones, attorney.

Q. Where was Jones living?

A. Jones was living in St. Louis, but subsequently removed to Seneca, Mo., where he lived for some years.

Q. How long were you working at the case?

A. I think I had been working at the case altogether about ten years; it may only be seven or eight years; I cannot recollect distinctly.

Q. Well, when did you commence proceedings in any court or before the surveyor general of the United States?

A. Well, Mr. O'Neil went to Santa Fé, New Mexico, several times, and had the record there transcribed, and communicated with the register there and the Government officers in relation to the matter. Mr. Jones also employed a Mr. Cunningham to assist him. He also had some communication with the officers at Santa Fé.

Q. These parties, as lawyers, that you speak of were to prosecute the claim and furnish the money for the case and expenses of carrying on the case?

Objected to for the reason that it is immaterial as to what the contract with clients may have been.

A. Well, I had a contract——

Q. Give it briefly.

A. Well, I took the case from Mr. Heath with the understanding that we were to furnish all the money necessary to prosecute it to a successful issue, he to furnish no money, because he was too poor, and after we succeeded, if we ever did succeed, that we were to be compensated for our services.

Q. Did you fail in the beginning and in the prosecuting of the case before the court or the surveyor general; and, if so, why?

124 A. We failed—I presume it would be counted a failure—because we did not have the title confirmed by reason of the want of funds necessary to prosecute the claim. The parties that offered to advance the money, and did advance some little, finally failed in providing the sum necessary to prosecute it, and therefore we were finally compelled to let the matter go.

Q. Gave up the case?

A. We could not go any further, because we had no funds to prosecute any further.

(I hand the witness paper dated May 19, 1882, and ask the witness)—

Q. Did you ever see that paper before?

A. Yes, sir; I saw this paper before.
Q. When?
A. This paper?
Q. Yes.
A. Well, in 1883; on the 19th day of August, 1883.
Q. In whose handwriting is that paper?
A. In mine.
Q. What is the paper?

Objected to; the paper will show for itself.

A. It is an affidavit or statement made by R. J. Heath and sworn to by him before W. P. Ford, clerk of the parish of Caddo, State of Louisiana.

(Paper filed and marked Ex. A.)

Object to it because it is an *ex parte* statement; further, that the official character of W. P. Ford, the alleged clerk, is not shown or vouched for by any authority authorized to serve in his official capacity or is authorized to administer oaths and take affi-
125 davits to instruments; that the loss of the original affidavit is not shown or accounted for, and the instrument itself purports to be a copy of a copy and is in its nature manufactured evidence.

Q. Mr. Palmer, did you mean to say a moment ago that it was an affidavit or a copy?
A. It is a copy; certainly it is a copy.
Q. What do you know about that being a copy; how do you know it? What is your recollection?
A. Well, I know it is a copy because I received the original by mail from Mr. R. J. Heath and had it for some time in my possession, and of course read it over once or twice myself and read it to several others, and then in 1883, at the time that this copy was made, I handed over the original affidavit to Mr. R. W. Jones, who was associated with us in the prosecution of this claim, and not wishing to lose the paper altogether before I handed it to Mr. Jones I made a copy of it, and this is the copy, and retained the same; retained this copy perhaps 3, 4, or 5 years, six years, mayby, and then, I think, I handed it over to Mr. Cessna, who is now connected with this claim.
Q. Is it a correct copy?
A. It is a correct copy.
Q. Did you ever see the original since that time; since you gave it to Mr. Jones?
A. No; I never did. I wrote to him for it; wrote to him for it on several occasions, but I never got it. I never have seen it since.
Q. Is Mr. Jones living or dead?
A. I understand that he is dead; I hear so.
Q. Where was Jones at the time you sent it to him?
126 A. He was at Seneca, Mo., in the southern part of the State.
Q. Did you have frequent communication with Mr. Heath at that time in reference to that business?

A. Yes, sir; a great deal of communication with reference to this claim. He wrote to me quite often, sometimes letters, sometimes postals; mayby 25, 30, or 40 altogether.

Q. Did the original have the official seal of the officer, with his mark?

A. Yes, sir.

Q. You have made search in your office for the original where it would likely be found?

A. I have looked over all my papers to see what there was in relation to this claim; hunted up every paper I had at home or in my office, and I, of course, never found the original of this affidavit.

Q. You were connected with this case quite a long time; how long?

A. 7, 8, or 9 years altogether.

Q. In your investigation of the matter what did you find as common reports, if anything, relative to Dr. Heath having taken a colony to New Mexico?

Objected to as heresay testimony and not following with any one of the exceptions rendering heresay testimony admissible.

A. Well, I can say this only: that I have heard during my connection with the case from diverous persons, whose names, of course, I do not now remember, in this city and persons who came to this city that Dr. Hetah organized a colony in the central part of this State and came to St. Louis with that colony, and that he brought different articles—a printing press, and so on—and went down the river, and from there to New Mexico, which was the seat of this grant.

127 Q. You did not state the period when he went down.

A. About 1822 or '3 or '4; along there, I believe. That, I believe, is the extent of my knowledge on this subject.

Q. Was this information gotten from old persons?

A. Some were old persons, others not.

Q. Can you call the name of any one at all from whom you got this information?

A. Well, none that is now living. There is one old man that is dead that spoke to me about that matter, that is Eugene Leitensdorfer, but that is the only one of any age that I can remember now.

Cross-examination by MATT. G. REYNOLDS, U. S. att'y:

Q. Did you ever know Dr. Heath in his lifetime?

A. I did not.

Q. Did you know R. J. Heath in his lifetime?

A. Personally, I did not.

Q. You never had any personal conversation with this man?

A. No. I never saw him.

Q. Was this affidavit made in response to instructions by his attorneys in the prosecution of the claim against the Government?

A. Yes; I think so.

Q. Had the case then been instituted in the court before the surveyor general?

A. Well, there was something done, but what I am not sure.

Q. Was any notice served upon the surveyor general on the taking of this affidavit?

A. Not that I remember.

Q. Did you serve any notice upon the U. S. attorney for New Mexico?

128 A. Not to my recollection.

Q. Was this copy ever filed with the surveyor general?

A. That I do not know; not while I had it.

Q. Do you know whether the one from which you took this copy was ever filed with the surveyor general?

A. That is the one you are speaking of. Which do you speak of? I know this was not, because it is a copy.

Q. Do you know whether suit was ever instituted before surveyor general for this claim under the law of 1854?

A. I do not.

Q. Did you know about the facts connected with the attempt of Dr. Heath to settle this, or is it what other parties have told you?

A. Altogether.

By agreement signature waived.

129 EXHIBIT "A."

STATE OF LOUISIANA, }
Parish of Caddo. }

Before me, the undersigned authority, personally appeared R. J. Heath, who, being by me duly sworn according to law, deposes and says that he is 67 years of age and a resident of Shreveport, Caddo parish, Louisiana; that he is the son of John G. Heath, deceased; that some time in the year 1822 his said father became the owner, through the government of Mexico, of a colony grant of land located in the then province of New Mexico, said grant being known as the "Bracito grant," the centre of which is on a small island in the Rio Grande river 30 miles, more or less, above El Paso, Texas, and measuring 5 leagues in length and five leagues in breadth. Affiant further says that the grantee, his father, stipulated in said grant to colonize the land with American citizens; that the grantee therefore returned to the United States; that he organized a company of colonists, in accordance with the provisions aforesaid, composed of families, mechanics, artizans, and farmers, and also that he employed a printer and purchased a printing press; also a large quantity of agricultural implements and machinery and all necessary supplies and paraphernalia for the needs of a colony, and that with this colony and material aforesaid he crossed the boundary of the United States, passed into Mexico, and reached the port of Soto La Morino; that affiant was one of the party, and that after the arrival at said place the Emperor Iturbide was put to death, when the country was thrown into a state of revolution. He further says that the Mexican

government as then organized refused to permit the said grantee and his colonists to occupy said grant of land; that said grantee and his colonists remained in the country for a long time, ready and anxious to occupy and improve said grant, and declared to the authorities their desire to occupy the same; that they demanded possession and united upon carrying out the provisions and
130 stipulations as aforesaid contained in the said grant or conveyance; that they waited through three years in the hope that the Mexican government would accord to them the rights they had acquired to take possession of and hold the land aforesaid, and that at the end of that time the authorities of the government of Mexico ordered them to leave the country under pain of imprisonment, and they were compelled and forced, by reason of such order, to quit the territory of Mexico and return to the United States.

Affiant further says that the grantee, his father, and his colonists, during their stay in Mexico, in the attempt to locate upon said land were persecuted and threatened and the grantee robbed of all his property by the people of that government, and that the property so taken from him amounted to a sum not less than $80,000 (eighty thousand dollars).

Affiant says that he was with the said expedition all the time it remained in Mexico, has personal knowledge of all the facts stated in this affidavit, and that the same are true in every particular.

R. J. HEATH.

Subscribed and sworn to before me on this 19th day of May, 1882, at Shreveport, State of Louisiana.

In testimony whereof I have hereunto set my hand and affixed the seal of the court.

[SEAL.] W. P. FORD, *Clerk.*

I certify that the foregoing is a true copy of the said affidavit of R. J. Heath; that I wrote it out from the original in order that I might send the original to Mr. Jones at Senaca, Mo.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at office, in St. Louis, Mo., this 19th day of May, 1883.

ENRIQUE PARMER,
Notary Public.

131 EXHIBIT "C" FOR PETITIONERS.

STATE OF LOUISIANA, }
Parish of Caddo. }

I, F. A. Leonard, clerk first district court of the State of Louisiana, do hereby certify that the following is a true copy of the records in my office, of which I am the proper custodian:

"W. P. Ford was duly elected clerk of the first district court for the term of four years and qualified as such on March 25th, 1880."

I further certify that as such officer he was fully authorized to administer oaths on the 19th May, 1882.

Given under my hand and seal of office, at Shreveport,
[SEAL.] Louisiana, on this April 20th, 1895.

F. A. LEONARD,
Clerk 1st District Court of Louisiana.

STATE OF LOUISIANA, }
Parish of Caddo. }

I, A. D. Land, judge of the first judicial district court of Louisiana in and for the parish of Caddo, do certify that F. A. Leonard, whose name appears signed to above and foregoing instrument, is and was at the time of signing same the duly qualified clerk of said court; that his signature as above is genuine, and that all of his official acts as such clerk are entitled to full faith and credit, and said attestation is in due form.

Given under my hand at Shreveport, Louisiana, on this the 20th day of April, 1895.

A. D. LAND,
Judge First Judicial District Court of Louisiana.

STATE OF LOUISIANA, }
Parish of Caddo. }

I, F. A. Leonard, clerk of the first judicial district court of Louisiana in and for the parish of Caddo, do certify that A. D. Land, whose name appears signed to above and foregoing instrument or certificate, is and was at the time of signing same the duly qualified judge of said court; that his signature as above is genuine, and that all of his official acts as such judge are entitled to full faith and credit, and said attestation is in due form.

Given under my hand and seal of office, at Shreveport, Louisiana, on this the 20th day of April, 1895.

[SEAL.]

F. A. LEONARD,
Clerk First Judicial District Court of Louisiana.

132 EX. B FOR PLAINTIFFS.

In the Court of Private Land Claims.

J. B. CESSNA *et al.*, Plaintiffs,
vs.
UNITED STATES *et al.*, Defendants. } Number 59.

It is hereby stipulated between the plaintiffs and the defendants that the deposition of Mrs. B. N. Jones, of Montgomery City, Montgomery county, Missouri, may be taken before Thomas B. Harlan, a notary public within and for the city of St. Louis and State of Missouri, without commission, the plaintiffs appearing by J. B. Cessna and the defendants appearing by Matt. G. Reynolds, U. S. attorney.

Mrs. B. N. JONES, being first duly sworn, deposes as follows:

Q. Please state your name, age, and residence.

A. Belinda N. Jones is my name; I reside in Montgomery City, Montgomery county, Mo.; age, 45.

Q. Who was your husband?

A. Robert W. Jones was my husband.

Q. When were you married?

A. Married in October, '79.

Q. Is Mr. Jones living or dead; and, if dead, when did he die?

A. He is dead. He died August, 1886.

Q. What was his business?

A. He was a lawyer.

Q. Where was he living in '82 and '83?

A. We were living in St. Louis in '82, and in the spring of '83 we left St. Louis and went to Seneca, Mo.

Q. Have you any knowledge of Mr. Jones having been connected as a lawyer with the case known as the Heath land grant of New Mexico with Mr. Palmer, Mansfield, and others?

133 A. I knew of Mr. Jones having connections with Mr. Mansfield in regard to a Mexican land grant. Mr. Heath was not associated in my mind.

(Handing paper to witness.)

Q. What, if anything, do you know of the paper or affidavit endorsed Affidavit of R. J. Heath, concerning a land claim of John G. Heath?

A. After my husband's death I sorted his papers, giving everything in regard to local matters to the administrator and keeping other matters myself. Among these papers were a great many deeds. I determined to burn everything of no value, and so I spent three or four days sorting papers, looking at every paper before it was burned, simply at either the label or the title. While sorting these papers I came across a paper like a deed, with a label upon it. This was labeled Affidavit of Robert J. Heath concerning land granted to his father, John J. Heath. I held the paper in my hand and hesitated as to whether it was of any value. There was nothing in that title concerning any case that I had known Mr. Jones connected with, for I had never thought of that Mexican land claim otherwise than as Mansfield's business. In opening the paper like this (opening paper in her hand) it was an affidavit. I did not read it. It was among a lot of deeds that I knew to be of no value, and I burned it.

Q. It was burned?

A. Yes, sir; all those papers were burned. I feel sorry for it.

Q. Please state further the character and appearance of that paper, as to whether it had an official seal.

A. When I saw it it was a deed; that means it had an official seal on it. It was a double piece of paper, like a deed. It
134 was like a deed; that was all I knew. Two years ago, when Mr. Cessna asked me if I knew anything or had any papers

about a Mexican land claim, I could have sworn then that I knew nothing about it, but when he spoke of the names and said it was an affidavit endorsed by R. J. Heath concerning a land claim of John G. Heath, it came back to me of my possession of it, but at that moment it had no connection of anything I had ever known before. That was the reason I considered it of no value.

Q. When you saw it looked like a deed was it writing or printing?

A. I had been burning deeds. Mr. Jones had owned a great quantity of land, and he kept everything. There was among his memorandum all the papers that he had had for years, and they were done up in bundles or packages, but these deeds were not, and that was why I opened the deeds at looked carefully at the labels.

Q. The instrument that you spoke of—was the label on it or on the envelope?

A. It was on the paper. A great many was put in envelopes and the label marked on them, but this was not in an envelope.

Cross-examination by MATT. G. REYNOLDS, U. S. att'y

Q. You did not read the paper?

A. I did not.

Q. You did not know its contents?

A. I did not.

Q. You knew it as Mansfield's claim?

A. Yes; I knew it as Mansfield's claim, but did not know Heath was about it.

135 Redirect examination:

Q. How did you know it as Mansfield's?

A. Because my husband had had an agreement with Mansfield about it, and I tried to persuade my husband not to have anything to do with Mr. Mansfield.

Q. Have you hunted carefully for this affidavit among the papers of Mr. Jones, where it would likely be found?

A. Among those that are left; yes.

By agreement, signature waived.

136 EXHIBITS C, D, E, F FOR PLAINTIFFS.

In the United States Court of Private Land Claims.

J. B. CESSNA *et al.*
vs.
THE UNITED STATES *et al.* } No. 59.

Depositions of witnesses produced, sworn, and examined on the 15th day of April, in the year of our Lord 1893, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of that day, at New Florence, in the county of Montgomery, State of Missouri, before me, Thomas J. Powell, notary public, in a certain cause now pending in the United States court of private land claims, between J. B. Cessna *et al.*, plaintiff-, and The United States *et al.*, defendants, on the part of plaintiff-, in pursuance of the annexed commission and at the time and place agreed upon by the parties hereto; J. B. Cessna appearing as counsel for the plaintiff-, Thomas B. Harlan for the defendant-.

Plaintiff produced the following witnesses in their order, as follows:

EXHIBIT "D" FOR PETITIONERS.

ELIZA J. BIBB, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, deposeth and saith:

Q. 1. State your name, age, and residence.

A. Eliza J. Bibb; residence, Americus, Missouri; age, 35 years.

Q. 2. Are you a relative of Dr. John G. Heath; and, if so, what relation?

A. I am a gran-daughter.

Q. 3. Who was your father, and what relation did he bear to Dr. John G. Heath?

A. Robert J. was my father's name. He was a son of Dr. John G. Heath.

Q. 4. Who raised you, Mrs. Bibb?

A. I was raised by my aunt.

Q. 5. Who was your mother?

A. Sarah Dyer was my mother's name.

137 Q. 6. When did she die?

A. In 1863.

Q. 7. How old were you at that time, of her death?

A. I was five years old.

Q. 8. When were you taken by your aunt?

A. About four months after my mother's death.

Q. 9. Did you ever see your father after that time?

A. No; I never saw him.

Q. 10. Do you remember your father?

A. Yes; I remember him.

Q. 11. Tell the circumstances of his leaving, when he left, and how he left.

A. He was taken prisoner by the Union soldiers and put in prison.

Q. 12. Did he go into the rebel army?

A. He was exchanged by the Union for a Southern soldier.

Q. 13. After the war what became of him?

A. He was in the South, in Shreveport, Louisiana.

Q. 14. Did you have frequent communications with him in his lifetime?

A. Yes, sir; we corresponded.

Q. 15. Can you tell about when he died and where?

A. He died in 1885, in San Antonio, Texas.

Q. 16. Mrs. Bibb, have you heard the heirs talk anything of this claim of land in New Mexico?

Objected to as hearsay.

A. I have heard them speak of this property.

Q. 17. Mrs. Bibb, have you got in your possession or do you know what became of the original title papers of the tract of land granted by the Mexican government to Dr. John B. Heath, in what is now the Territory of New Mexico, in the year 1823?

A. No; I haven't got them; but I know that they were burned in 1863 by the Union soldiers after father was taken prisoner.

Q. —. State where and how they were burned.

A. It was in Gasconade county, Missouri; all of our property was destroyed by the Union soldiers. The papers were in a chest with the other things burned.

138 Q. 19. Please state fully the circumstances of your having to leave the place and the reason why you left.

A. We were notified a few hours before sundown that the soldiers were to come in and take our home from us. Then my mother took myself and we took a boat and came across the river. After we started we looked back and saw the things burning.

Q. 20. Mrs. Bibb, what, if any, effort or acts have been done within your knowledge by your father, yourself, and other heirs of John G. Heath, within the last twenty or thirty years, towards a prosecution for the claim or right to a tract of land in New Mexico, not far from El Paso, Texas?

Objected to as incompetent and irrelevant.

A. Yes; I know that in 1881 and 1882—I know that they tried to get up a suit of this land grant, and my aunt told me that they could do nothing in this State, because our papers were burned by the soldiers in 1863.

Q. 21. Where was your father in that time, in 1882, all the period you speak of?

A. In Shreveport, Louisiana.

Q. 22. Did or did not the heirs have some difficulty or trouble agreeing upon the attorney to prosecute the claim, and what was the reason it was not prosecuted?

Objected to as incompetent, irrelevant, and immaterial.

A. I know my father did not like the way some of the attorneys acted in their proceedings.

Q. 23. What kind of attorneys did he want with reference to north and south?

A. He did not like the attorneys, because they were Union men.

Q. 24. Is that the reason he assigned?

A. It was.

Q. 25. What heirs, if any, did your father leave?

A. I was the only child, but he left a wife.

Q. 26. Did you ever see his wife?

A. Not until yesterday.

Q. 27. Did you ever have communications with her after his death?

A. She notified me of his death, and I answered that and never got anything more from her.

139 Cross-examination:

Q. 28. Mrs. Bibb, you say you were raised by your aunt?

A. Yes.

Q. 29. Where?

A. Principally here—in New Florence.

Q. 30. How long have you lived in New Florence?

A. We lived here seven years; but I went to my aunt, who lived in Loutre.

Q. 31. How long has this been your home?

A. 30 years.

Q. 32. Did you ever know Dr. John G. Heath?

A. No.

Q. 33. Did you ever see him?

A. No.

Q. 34. Have you any personal knowledge of him or his whereabouts?

A. No, sir; only from hearsay.

Q. 35. You say those title papers referred to herein were burned?

A. Yes, sir; they were burned.

Q. 36. How do you know they were burned?

A. Because I know all of my father's papers were in that chest, *but* -any — my grandfather's papers, too, and they were all burned.

Q. 37. How did you know that there were any papers in the chest?

A. Because I had seen them in there, and heard my grandmother say they were there and my aunt, and that they were burned.

Q. 38. When did you hear them say this?

A. I heard my grandmother say this about six years after I was about 10 or 11 years old, and my aunt told me so in the year 1881 and 1882. It was between those two years.

Q. 39. You say you saw papers in that chest?

A. Yes, sir.

Q. 40. Were the particular papers referred to herein and known as the title papers of a grant purported to have been given to Dr. Heath by the Mexican government in that trunk?

A. I know that my father's and my grandfather's papers were in that trunk, and that I was told afterwards that they were my grandfather's papers; that they were in reference to the land in
140 Mexico.

Q. 41. Did your father or grandfather owe any land that you know of?

Objected to as irrelevant, immaterial, and a possible subject of cross-examination.

A. I don't know anything about them owning the land only from hearsay, and that the grant had been given.

Q. 42. I referred to land anywhere; in this State or anywhere.

A. My father owned land in this State.

Q. 43. Did he own the place where you were living?

A. Yes, sir.

Q. 44. Was your father in business?

A. Yes, sir; he had been; in Gasconade county.

Q. 45. Then, is it not probable that the papers that were contained in that chest related to the titles and matters other than this Mexican grant?

Objected to as a conclusion and not competent.

A. Some of the papers I know were about my father's business; but the others were about my grandfather's business.

Q. 46. Do you know of your own knowledge that there were title papers in that chest referring to this Mexican grant? Answer of your own knowledge.

A. No; not that I know myself; but I know they were there because I was told by parties that did know.

Q. 47. Who told you they were there?

A. My grandmother and my aunt.

Q. 48. When did they tell you they were there?

A. In 1867 my grandmother told me, and I frequently heard my aunt say so.

Q. 49. Did your grandmother tell you that these particular papers were in that chest?

A. She said the papers were all burned of my grandfather's relating to the Mexican land.

Q. 50. Are you sure she said Mexican land?

A. She said the land grant that my grandfather had taken.

Q. 51. Taken from whom?

A. From the Mexicans or Spaniards.

141 Q. 52. How old were you when this property was burned?

A. I was five years old.

Q. 53. Do you read Spanish?

A. No, sir.

Q. 54. How old are you now, Mrs. Bibb?

A. 35.

Q. 55. Is your health good?

A. Yes, sir.

Q. 56. Is there any reason why, if your expenses were paid, you

could not go to Santa Fé, New Mexico, and testify before the court in this cause?

Objected to.

A. It would be impossible for me to leave my children. They are all small and are now sick.

Redirect:

Q. 57. Please state the condition of your family and yourself about a month ago or more, and could you have gone at that time to Santa Fé?

A. I could not; I was sick myself, and the children also.

Q. 58. Did you inform me of that fact at that time?

A. Yes, sir.

Q. 59. Who is your husband?

A. Malam A. Bibb.

Q. 60. Are you and Malam A. Bibb two of the plaintiffs in this cause?

A. Yes.

Q. 61. Mrs. Bibb, you spoke of your grandmother and aunt having told you about the Mexico papers being burned. Were they or were they not the parties who had the custody of your father's and grandfather's papers at the time the soldiers destroyed them?

A. No; my mother had them in her charge, and we were all living in the same house.

142 Q. 62. At the time your grandmother and aunt spoke or told you of these title papers of the Mexican land grant that was given to your grandfather were burned or destroyed what were you then talking about? Was or was it not in reference to this particular Mexican land grant, and what was said about it?

A. We were talking about the land grant and about the lawyers getting the claim, and she said it was not necessary for them to go on, because all the papers were burned in Gasconade by the soldiers.

Cross-examination:

Q. 63. At the time your aunt made the remark to you that it was not necessary to prosecute the claim how old were you?

A. I was about 28 years old.

ELIZA JANE BIBB.

EXHIBIT "E" FOR PETITIONERS.

FRANCES I. HEATH, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, deposeth and saith:

Q. Please state your name, age, and residence.

A. My name is Frances I. Heath; age, 50 years. Shreveport, Louisiana, is my residence.

Q. Were you ever married?

A. I was.

Q. Who was your husband?
A. R. J. Heath.
Q. Give Mr. Heath's full name.
A. Robert J. Heath.
Q. When and where were you married to Robert J. Heath?
A. I was married in Union parish, Louisiana, in 1865.
Q. Is Mr. Robert J. Heath living? If not, when did he die?
A. He is not living; he died in San Antonio, Texas, in 1885.
Q. About what aged man was he when he died?
A. About 80 years, to the best of my knowledge.
Q. Who was the father of Robert J. Heath?
A. Dr. John G. Heath.
Q. When did you first know Robert J. Heath?
143 A. In 1864.
Q. Where did he come from and what was his former home?
A. From Missouri.
Q. What heirs, if any, did Robert J. Heath leave?
A. He left one daughter and myself, his wife.
Q. Who was that daughter?
A. Eliza Bibb.
Q. Do you know where she lived?
A. She lived in Americus, Missouri.
Q. Were they the only heirs that he left?
A. The only ones, to my knowledge. I never heard him speak of any others.
Q. Did Robert J. Heath leave a will or did he die intestate?
A. He left none to my knowledge.
Q. What, if anything, through information that came from Robert J. Heath, do you know as *the* Dr. John G. Heath having in th- year 1823 or thereabouts obtained a grant or tract of land from the Mexican government through the town council of El Paso, Mexico?

Objects to the witness testifying to what she has heard some one else say.

A. I have heard my husband say that his father owned a grant of land in Mexico, and that they went there with a colony of people to take possession, to occupy and cultivate it and make it their home, and from the time the land was granted to the time they went back there had been a change of officers, and they were not received kindly. These new officers had been put in since his father first got the grant. They didn't want them to have the land and persecuted them; stole their stock and property, and finally drove them from the country, and they had to leave for fear of being killed.
Q. Who interfered and would not let them occupy the land? Was it the Mexican authorities who had previously made the grant?
A. According to my knowledge, those who had made the grant were out of office and new officers were in, and it was the Mexican authorities who interfered.

Q. What, if anything, did he say as regards one of the
144 leading authorities being killed at that time—the Emperor?

A. I don't really remember about that; I could not tell who it was. It was one of the leading officers who was killed, but I don't remember his name.

Q. What, if anything, did you ever hear your husband, Robert J. Heath, say as to having gone with his father, Dr. John G. Heath, with a colony to Mexico, in 1823 or 1824, to settle and occupy this grant or tract of land above referred to.

A. Objected to as hearsay.

A. I have heard him — that when he was a lad of a boy that he did go with his father to Mexico, and that they stayed there about one year, and that the Mexicans treated them so badly that they came back to the United States.

Q. Did they remain there?

A. They did not.

Q. Did they occupy and cultivate this land or did the Mexicans authorities or grantors interfere and prevent them?

A. I don't really know how long they did stay there, but I know that the Mexicans treated them so badly and they were forced to leave under penalty of death; they destroyed their stock, mules stole from them, and broke them up financially.

Q. What, if anything, did you ever hear him say as to expenses of the expedition and their attempt to occupy and cultivate this land?

Objected to as hearsay.

A. I heard him say that his father spent a great deal of money, but I do not remember the amounts. I couldn't say how much, but I know I heard him say that he spent a great deal of money.

Q. As to what condition did they say they were left financially?

Objected to as hearsay, incompetent, and irrelevant.

A. They were ruined financially.

Q. Please explain more fully what you mean by they being ruined *ruined* financially.

A. Dr. John G. Heath had spent a great deal of money and he had carried a colony of people there to settle on the land, and then the Mexicans stole their mules and stock and drove them
145 out of the country.

Q. What, if anything, did you ever hear your husband say as to the Mexican government and authorities having refused to give them and their colony possession and protection, and telling them that they could not occupy the land, but would have to leave the country?

A. Objected to as hearsay.

A. Well, the government wouldn't protect them on the land. They made application to the officers several times, but they would

not listen to them; then they persecuted them so they were finally driven plumb out.

Q. Did or did you not ever hear your husband say that Dr. John G. Heath, in 1823 or 1824, took to Mexico and this land all the colony stores, implements of husbandry, and everything necessary to establish a colony, and in every way on his part complied with the conditions of the grant?

A. Objected to as hearsay.

A. I have heard him say that his father did comply with his part of the contract and take a colony there to settle on the land.

Q. What, if anything, do you know as to the efforts and acts of your husband and other heirs of Dr. John G. Heath during his lifetime and after your marriage in trying to get title to this land?

A. In 1880 or 1881 my husband was corresponding with a man by the name of Fisk and with the other heirs to the estate and tried to get them at that time to agree upon some plan where they might have this claim attended to. The other heirs disagreeing with him, for a while he dropped it; then in '82 he became very much in earnest about it again. We broke up in Shreveport, sold our property there, and moved to El Paso, Texas, in order to be near where this land was, thinking that he would go over into Mexico with his lawyer to look the estate up. The lawyer failed to do what he agreed to do, and this matter was dropped, my husband not having money to carry on any lawsuit.

Q. Was or was not the want of finance the chief reason why the claim was not prosecuted long ago?

Objected to as irrelevant, incompetent, and immaterial.

146 A. From as far back as I knew him lack of means was the cause.

Q. Did or did not Robert J. Heath, as one of the heirs of Dr. John Heath, always assert and claim an interest in a tract of land on the Rio Grande river, in New Mexico, and not far north from El Paso, granted by the town council of El Paso, New Mexico, to Dr. John Heath?

Objected to as hearsay, irrelevant, and incompetent.

A. Yes, sir; he always claimed that he had an interest in that land and that some time he expected to get it.

Cross-examination:

Q. Mrs. Heath, where did you first become acquainted with Robert J. Heath?

A. In Union parish, Louisiana, in the spring of '64.

Q. How long had you lived in Union parish at that time?

A. I came to Union parish in '52 and had lived in that parish 12 years.

Q. How long had Robert J. Heath lived there when you made his acquaintance?

A. He was a rebel soldier at that time and belonged to the army.

I don't think he was in the parish more than one month when I first knew him; probably not so long.

Q. Do you know where he lived before that time?

A. I heard him say that he lived in Missouri, not very far from St. Louis; somewheres on the Missouri river.

Q. Had he ever before been married?

A. He had.

Q. Was his wife then dead?

A. In '64, I do not remember; I only had a short acquaintance with him as a rebel soldier.

Q. How long after that were you married to him?

A. In '65 he came back and we were married in '65.

Q. Was that more or less than a year from the time you first knew him?

A. I think it was probably a little less; something near a year, as well as I remember.

147 Q. Do you know whether or not at the time you married him he had a wife living?

A. I know nothing except what he told me, and other Missourians that were in our part of the country. They told me that his wife was dead, and so did he.

Q. Those were the representations that he made to you?

A. Yes, sir.

Q. As a matter of fact, did he not at that time you married him have a lawful wife living?

A. Not according to my knowledge.

Q. Have you not found out that to be the case?

A. I have not.

Q. Have you any interest or do you make any claim to this property in controversy?

A. I do, as his wife, and expect to get a portion of it.

Q. Was there any ceremony at the time you were married?

A. Yes, sir.

Q. Was there any ceremony ever performed after that?

A. There was not.

Q. Did Robert J. Heath live with you until the time of his death?

A. He did.

Q. You say that you have heard Robert J. Heath say that he went with his father to Mexico in 1823 or '24?

A. I don' remember the dates, but I remember he said he went with his father to Mexico. I won't say what year.

Q. In what year was Robert J. Heath born?

A. I do not know.

Q. How old was he when he went with his father to Mexico?

A. He said he was a lad of a boy.

Q. Well, did you ever hear him say about what his age was?

A. I never did, except he told me once that he was old enough for my father, and he had children, if they were living, would — older than I was.

Q. Did he tell you that he had no children?

A. No, sir; he told me that he had a son and a daughter.

Q. What has became of that son?

148 A. He died.

Q. When?

A. Somewhere about '78, I think; I don't know exact.

Q. When did Robert J. Heath die?

A. He died in '85, 1885.

Q. How old was he at that time?

A. I do not know.

Q. About how old was he?

A. About 80.

Q. Under what circumstances did your husband talk to you about this colony?

A. Well, when this man Fisk wrote to him about it he was very anxious to sell out and move down there so as to try to get possession of the land, but I was not willing to go, and it went on that way for near two years, and he often told me about it and about what a fine estate it was, and that if he could get it settled we would have plenty to do us the rest of our lives.

Q. He told you these glowing stories to induce you to go with him to New Mexico, did he not?

A. He never asked me to go with him to New Mexico, only to El Paso, near the border line.

Q. Aside from what your husband has told you and from what you have heard from others say, you have no knowledge of this reported grant, have you?

A. No, sir; I have not.

Q. Did you ever hear your husband say how many families were in that colony?

A. I have heard him say, but I do not remember. I will not attempt to try to say how many.

Q. Did you ever hear him say how long the colony remained in Mexico?

A. There was a part of them stayed there between two and three years.

Q. What became of the other party?

A. They came back to the States earlier than that.

Q. What machines, medicines, and implements of hus-

149 bandry did they take with them?

A. I do not remember hearing him say what particular things, only knowing they went down with such things as they could fix up to live and cultivate the land. Well, I have heard him say that his father said he carried out his part of the contract.

Q. But whether he did carry it out you do not know, do you?

A. I do not, except what he told me.

—. Who did your husband say drove these people out of the country?

A. The Mexicans, that were in authority at that time.

Q. Are you sure he said "authority"?

A. I am not sure that he said "authority."

Q. Of your own knowledge, you know nothing of any grant, title, or deeds of any colony formed by Dr. John G. Heath in Mexico?

A. No, sir; of my own personal knowledge I know nothing about it.

Q. What is your age?

A. Fifty years.

Q. Where do you live?

A. At Shreveport, Louisiana.

Q. Did you come up here for the purpose of testifying in this cause?

A. I did.

Q. Is there any reason why, if your expenses were paid, you could not go to Santa Fé, New Mexico, and testify before the court in this cause?

Objected to.

A. Well, my age would be one reason, and I have no brother or husband to go with me would be another reason. I wouldn't like to go that far without protection.

Q. Did you come up here alone?

A. I did.

Q. Mrs. Heath, here and in this neighborhood you have friends and relatives to visit with and stay with while here?

A. Yes.

Q. Do you have any relatives, friends, or acquaintances at Santa Fé, New Mexico?

A. No, sir.

Q. Did you ever travel much?

150 A. No, sir.

Q. You wouldn't like to attend court at Santa Fé by yourself?

A. I would not.

Q. When you said, in reply to the question asked by Mr. Harlan, that you would not say positively that the words "authorities" or officers of Mexico as used by your husband——

(Form of question objected to.)

What did he say as to the reason why they were not permitted to occupy the land?

A. Well, there was a change in the officers from the time the grant was given up to the time they went to possess it and they didn't want them to have the land.

Q. What officers or government do you refer to?

A. The Mexican government.

Q. If, as you say, there was a change in the government of officers about that time when did he say interfered with their occupying and cultivating this land?

A. Well, he said that the Mexicans wouldn't protect him in their grant. I remember that. They were forced to leave the country.

Q. Did or did he not assign as the reason for their not getting and occupying and cultivating the land a change in the government and officers and authorities of Mexico?

Objected to as leading—as being testimony of counsel instead of witness.

A. Well, that was his belief. He did say it was a change of the officers of the Mexican government.

Q. Mrs. Heath, what was the religious faith and to what church did Robert J. Heath belong?

A. He was a Catholic.

Q. Was he and his brother and sisters raised and educated as Catholics?

A. They were.

Q. Mrs. Heath, did you ever heard your husband say what was the Spanish of Dr. John G. Heath *and* which the Mexican grant was made? If so, what was the name?

A. I have heard him say that his father was called Juan Gid by the Spaniards.

151 Q. Was that his Mexican name?

A. Yes, sir.

Cross-examination:

Q. You say that the reason your husband and the colony was not permitted to occupy that land was that the Mexican authorities drove them off?

A. Yes, sir; that's the way I understand it and what my husband told me.

Q. Are you sure that he said authorities?

A. I am sure that he said the change of officers was the cause of it.

Q. Are you sure that he said that the change of officers was the cause of it or that he believed that the change of officers was the cause of it?

A. I wouldn't like to answer that right direct. I don't really know that he was sure of it or that he believed it. I know that he did believe that to be the cause of it.

Q. You say that Robert J. Heath was a Catholic?

A. I do.

Q. Did he observe all of the rites, ceremonies, etc., of the Catholic Church while you knew him?

Objected to as being immaterial and irrelevant as applied to the period in which she knew him for the reason that after New Mexico became part and parcel of the United States it makes no difference whether Robert J. Heath or other heirs of John G. Heath remained Catholics or not.

A. He did not, but he never joined any other church and died in that belief, so far as I know.

Q. Mrs. Heath, you have said that Robert J. Heath was a Catholic. How do you know that?

A. He told me so.

Q. When he told you so what period did he refer to?

A. The period when he told me. It was [illegible] when I asked the question.

Q. Was he following the dictates of his religion when he represented to you that he was unmarried?

To this we object for reasons above.

A. According to my belief, he was.

F. I. HEATH.

152 Subscribed and sworn to before me this 15th day of April, A. D. 1893.

THOS. J. POWELL,
Notary Public.

My term of office expires 6th of May, 1893.

EXHIBIT "G" FOR PETITIONERS.

JOHN B-ST, of lawful age, being produced, sworn, and examined on the part of the plaintiff-, deposeth and saith:

Q. State your name, age, and residence.

A. John Best; Montgomery county; near Montgomery City, Mo.; age, about 60 years old.

Q. Did you know Dr. John G. Heath?

A. Yes, sir.

Q. When and where did you know him?

A. I knew him when I was a little boy; at the mouth of the Gasconade river.

Q. Where did Mr. Heath live at that time?

A. He lived in Gasconade Co., at the mouth of the Gasconade river.

Q. Do you know when he died?

A. I could not say positively.

Q. Where did he die—in what country?

A. As well as I can fix up in my mind, he died in Cooper county, at *at* his salt mines in that country.

Q. Where is he buried?

A. My understanding, he was buried in Cooper county; right close to his salt mines. I can't say exactly.

Q. How many heirs did John G. Heath leave, and what were their names?

A. He left five or six; I believe five. The oldest was Robert J. Heath and Harriet. I think she married Sam. Gower. Then Eliza married —— Sherman. One named Ellen, it seems to me. There was one named Joseph; and the others I am not sure.

Q. Mr. Best, were not the heirs of John G. Heath Robert, Joseph, Harriet, Margaret, and Eliza?

A. Yes.

Q. Is Joseph dead, and did he marry and leave any children?

153 A. He is dead, and never was married, and left no children.

Q. Do you know anything about the Sherman family?

—. ——.

Q. Did you know Robert J. Heath?

A. Yes, sir.

Q. When did he leave the country?

A. It was during the war, the first part of the war. I don't remember exactly; about '62 or '63.

Q. Where did he go?

A. Into the Southern army.

Q. Did you ever see him since?

A. No, sir; I never saw him after he went away.

Q. Did he remain in the South?

A. I don't know whether he did or not; he never came back. I heard he remained in Shreveport, Louisiana.

Objected to as hearsay.

Q. Was Robert J. Heath married; and, if so, to whom?

A. He was married to Sarah Ann Dyer. She lived only a little while after he left and went into the army.

Q. Did he leave any family?

A. Yes, sir; he did. He left two children—Johnnie Heath, my sister's son, and Mrs. Eliza Bibb, the lady that was here.

I object to counsel putting words in the mouth of witness.

Q. Was the lady you referred to, Mrs. Bibb, the one that testified this morning?

A. She was.

Q. Is Johnnie Heath alive, and when did he die?

A. No, sir. I couldn't be positive about the year. I think he's been dead about 21 or 22 years.

Q. Was he married, and did he leave any children?

A. No; he wasn't married; he left no children. He was 18 years old when he died.

Q. Was Robert J. Heath married previous to the time that he married Ann Dyer?

A. He was.

154 Q. Who was his first wife, and is she dead; and, if so, when did she die?

A. She was my oldest sister; she is dead; I think she died just before '44.

Cross-examination:

Q. You say you knew Dr. Heath?

A. I did.

Q. You mean Dr. John G. Heath, do you?

A. Yes; I knew him.

Q. When did you know him?

A. I knew him from a little boy; been in his store a many a time.

Q. About what year was that?

A. I couldn't tell exactly; if I knew exactly how old I was I could tell you.

Q. About when was it?
A. I can't state definitely.
Q. Was it before 1823?
A. It was a good while after 1823.
Q. Tell us, Mr. Best, what you know about Dr. John G. Heath.
A. I was too young to remember much about him.

JOHN BEST.

Subscribed and sworn to before me this 15th day of April, A. D. 1893.

THOS. J. POWELL,
Notary Public.

My term of notarial office expires 6th of May, 1893.

ESTHER C. HUNTER, of lawful age, being produced, sworn, and examined on the part of the plaintiff-, deposeth and saith:

Q. Please state your name, age, and residence.
A. Esther C. Hunter; age, 49; New Florence, Mo.
Q. Are you a relative of Dr. John G. Heath; and, if so, what relative?
A. Granddaughter.
Q. Who was your mother; what relation did she bear to
155 Dr. John G. Heath?
A. Daughter of Dr. John G. Heath.
Q. Who was your father?
A. William Sherman.
Q. How many heirs, sons and daughters, had the said John Heath, and who were they?
A. Five.
Q. Give their names.
A. Robert J. Heath, Eliza, Harriet, Joe, Margaret.
Q. Did you ever see your grandfather, John G. Heath?
A. Yes, sir.
Q. Where was he living at that time?
A. Cooper county.
Q. Do you know when and where he died?
A. He died in Cooper county, near the Lamean river.
Q. Do you know where he was buried?
A. He was buried near the Lamean river, in Cooper county.
Q. Were you at his funeral?
A. I was.
Q. About what time did he die?
—. About 1850 or '51.
Q. Is Joseph living; and, if not, when and where did he die?
A. He died near the Gasconade, Gasconade county.
Q. When did he die?
A. About 1855.
Q. Was he a single man and did he leave any heirs?
A. He was single; he left no children.
Q. Who did Margaret Heath marry?

A. She married James Edsaw.
Q. Is she dead?
A. Yes.
Q. When did she die?
A. I don't believe I know; about '57 or '58.
Q. Did she leave any heirs?
A. None; no children, only brothers and sisters.
Q. Is her husband dead?
A. Yes.
156 Q. Did he die before she did?
A. He died after she did.
Q. Who did Harriet marry?
A. Samuel Guier.
Q. Is she dead, and when did she die?
A. She died about '56, I believe.
Q. Did she leave any children?
A. No, sir.
Q. When did her husband die; before or after she died?
A. He died before.
Q. Is your mother, Eliza, dead; and, if so, when did she die?
A. She is dead; died in 1863.
Q. How many heirs did she leave?
A. Six.
Q. Name them.
A. Sarah, Esther C., myself; Rebecca, Harriet, Adalaide, Robert Sherman.
Q. Give the full name of Rebecca.
A. Mary Rebecca Keedle.
Q. Are Harriet and Adalaide living?
A. No, sir.
Q. When—about how old were they when they died, and did they leave any children?
A. About 18 or 19, and left no children.
Q. Is Robert Sherman living, and is he one of the parties in this cause?
A. Yes.
Q. Who did Sarah marry?
A. William Scott.
Q. Is she living?
A. No.
Q. About what time did she die?
A. About '73.
Q. How many heirs did she leave?
A. Two.
Q. Are their names Charles W. Scott and Alice?
157 A. Yes.
Q. Is Charles W. Scott dead or living?
A. Dead.
Q. What heirs did he leave?
A. A widow and two or three children.
Q. Where do they live?

A. They live in Galesburg, Illinois.
Q. What is Alice's name?
A. Alice Woods.
Q. Where does she live?
A. Denver, Colorado.
Q. She is married since the bringing of this suit? What is her husband's name.
Q. Yes; I don't know her present husband's name.
Q. Were or were not these two the only heirs left by your sister Sarah Scott?
A. Yes.
Q. What religious faith or church did the said John G. Heath and his heirs and descendents all belong?
A. Catholics.
Q. To what church did your uncles and aunts all belong?
A. Catholic.
Q. And your mother?
A. The Catholic Church.
Q. Were you raised and educated as a Catholic?
A. Yes, sir.
Q. What school did you attend?
A. The Catholic convent at St. Charles, Missouri.
Q. What do you know, if anything, as to Dr. John G. Heath having in the year 1823 obtained a grant or tract of land from the Mexican government through the town council of El Paso, Mexico?
A. I heard my mother and uncle speak of it.
Q. Where was the grant located?
A. In Mexico, on the Rio Grande.
Q. Can you name any town near where it was located?
158 A. Near El Paso.
Q. Did you ever hear your mother or other heirs or parties claiming interest in the land talk about it; and, if so, what did she or either of th m say about the matter?

Objected to s hearsay.

A. I heard them say it was a large tract of land near El Paso. It was given to them by the Mexican government. I think they took a colony there and attempted to settle; was prevented by the change in government. The law under which our grant was given was repealed, they claimed.
Q. What was the reason assigned as to why they were not permitted to occupy and cultivate the land?
A. It was the new government.
Q. What else, if any other reason, or have you already given it?
A. I have given it.
Q. From the information obtained from your mother and uncle and grandfather, did they settle on this land. and, if not, why not?

Objected to as hearsay.

A. They attempted to, but was prevented by the Mexicans.
Q. When you say Mexicans what do you mean?

A. I mean the rulers and people in general.

Q. Did you ever hear your mother say about going with Dr. John G. Heath and a colony to New Mexico to make their home, to settle upon and cultivate this Mexican land grant?

Objected to as hearsay.

A. I have a many a time.

Q. Tell what she said.

Objected to as hearsay.

A. She said grandpa had spent quite a fortune in trying to colonize; she said they went by land and took everything that was needed for a colony.

Q. Was your mother along?

A. She was.

Q. Who else was along?

A. The whole family was along, and quite a number of other parties.

159 Q. How long did they remain down there?

A. I do not know.

Q. Did they stay upon the land; and, if not, why not?

A. They stayed a short time; was prevented by the government from staying there.

Q. What else did you hear them say, if anything, with regard to the threats?

A. He was forced to leave under penalty of the law, and had to flee for his life, and lost all he took there.

Q. What do you mean by "the penalty of the law"?

A. They threatened to put him to death; supposed that was the new government.

Q. Did or did not your uncle Robert J. Heath and your grandfather John G. Heath ever tell you the facts relative to this land grant and the attempt to occupy similar to what you have now testified as having been told you by your mother?

Objected to as leading.

A. I heard them speak of it.

Q. What, if anything, did your uncle Robert J. Heath and your grandfather John G. Heath ever tell you about this land grant?

Objected to as hearsay.

A. I have heard them speak of it.

Q. In what way?

A. I heard my uncle Robert speak of going over there with my grandfather.

Q. Did your mother ever talk to you about this matter, as you have stated above, in the presence of Robert J. Heath and Dr. John G. Heath?

A. I have heard my uncle talk about it to my mother.

Q. And your mother talk to him?

A. Yes.

Q. Have or have you not told us the substance of their conversations that they had together?

A. Yes.

Q. Was or was not what was told to you about this grant and the attempt to occupy it and cultivate the land by Robert J.

160 Heath or Dr. John G. Heath similar or different from what you have testified as coming from your mother?

A. It was similar to the same.

Q. Did or did you not ever hear your mother, uncle, and grandfather say that Dr. Heath took to Mexico and to this land all the colonist-, stores, implements, and in every way complied on their part with the conditions of the grant; and, if so——

Objected to as hearsay and leading.

A. I have.

Q. If anything, what did you ever hear your mother, father, and uncle say relative to complying with the contract on their part?

Objected to as hearsay.

A. I heard them say they had done all in their power to colonize it and were forced to leave.

Q. By whom?

A. By the new government.

Q. Have you ever seen the original title papers of this grant of land given to Dr. John G. Heath or do you know what has become of them?

A. I have never seen them; do not know what became of them.

Cross-examination:

Q. Mrs. Hunter, have you an interest in this claim?

A. I have.

Q. You are a granddaughter of Dr. John G. Heath, are you?

A. I am.

Q. Have you ever seen the Doctor?

A. I have.

Q. How old were you when the Doctor died?

A. About five years old.

Q. Was the Doctor then living at your house?

A. No, sir.

Q. Were you living with him?

A. No.

Q. Did you reside in the same town with him?

A. The same county.

Q. How often did you see the Doctor?

161 A. A number of times.

Q. Well, about how often—once a week, a month, or once a year?

A. Sev-ral times a year.

Q. Did he ever talk to you about this grant?

A. He talked to my mother.

Q. Then the testimony that you have given relative to what Dr.

John G. Heath said about this land is what you heard him tell to somebody else, is it?

A. Yes.

Q. How long had Dr. John G. Heath resided in the State of Missouri immediately prior to his death?

A. I do not know.

Q. About how long?

A. I cannot say.

Q. Was it a year, five years, ten years, or more?

A. It was before I could remember.

Q. Did you ever hear anybody say how long he had lived in Missouri prior to his death?

A. No.

Q. What were the circumstances that led to Dr. Heath's going to Mexico?

A. Purpose of getting land, I heard them say.

Q. Was Dr. Heath a native-born American?

A. He was not.

Q. What was his nationality?

A A German.

Q. What age was he when he came to this country?

A. I do not know.

Q. Did you ever hear any one say?

A. No.

Q. Do you know his age at the time he went to Mexico?

A. No.

Q. How many times did he go to Mexico?

—. Went several times—twice or three times, I believe.

Q. When was the first time he went?

A. Don't know.

162 Q. Do you know how long he stayed?

A. No.

Q. Was he a resident of the State of Missouri before he went to Mexico?

A. He was.

Q. What was his business before he went to Mexico?

Objected to as not a proper subject of cross-examination, being relative of facts long prior to her birth, about which she did not attempt to testify.

A. Do not know.

Q. Did Dr. Heath go to Mexico each time for the purpose of obtaining land?

A. He did.

Q. How many grants did he obtain?

A. Only one that I've ever heard spoken of.

Q. In what year did he obtain this grant that you speak of?

A. In '23 or '24.

Q. Upon what information do you base that conclusion?

A. I have heard my mother and uncle and aunts all speak of it.

Q. Did you ever hear your mother, uncle, grandfather, or aunts say what were the conditions upon which that land could be granted?

Objected to as irrelevant, immaterial, and incompetent.

A. They were to colonize it, inhabit it, and make it their home.

Q. How many families were to be taken there for the purpose of this colony?

A. There was a number of them; don't know how many.

Q. How many families did they actually take?

A. I don't know.

Q. Did you ever hear any one say?

A. I have heard my mother and uncle say there were quite a number. I never heard the exact number.

Q. How much land was your grandfather to receive for the purposes of this colony?

Objected to as irrelevant, immaterial, and incompetent. The grant speaks for itself.

A. Do not know.

Q. Did you ever hear any one give a description of that land?

A. I have heard it spoken of.

163 Q. What kind of land was it described to be?

A. I don't know that I ever heard them say.

Q. Did you ever hear any one say what that land was called?

A. It was called the Heath land grant.

Q. Did you ever hear what the Mexicans called it?

A. I never did.

Q. Do you know anything about the landmarks on that land?

A. I do not.

Q. Did you ever hear any one say how much land there was in the tract?

A. I heard how much, but I don't remember.

Q. You say you have heard your mother speak of the land?

A. Yes, sir.

Q. Was she ever there?

A. She was.

Q. When?

A. '23, I guess.

Q. Who did she go with, and how did she happen to go?

A. She went with my grandfather; they moved out there.

Q. Did your mother ever talk directly to you about this land?

A. She did.

Q. How long since?

A. It's been about 35 years.

Q. How old was you at that time?

A. I don't know how old I was; I am 49.

Q. How old was your mother at that time?

A. I don't know.

Q. Was she an old woman?

A. No; she was not very old.

Q. Did any one ever tell you for a certainty that Dr. Heath and

his colony were prevented from settling on that land or disturbed in the possession thereof by the authorities or officers of the Mexican government?

A. I heard my mother and aunt and uncle speak of it.

Q. Now, wasn't it just a mere matter of belief among them that they were prevented by the Mexican government from taking possession?

Objected to as asking her conclusions and not a statement of the facts or what was said to her.

164 A. It was not a belief.

Q. Now, do you mean to state upon your oath that any of these parties told you that the authorities or officers of the Mexican government prevented them from settling upon that land?

A. They did.

Q. In answer to a former question you say that your grandfather and the families that attended him were prevented from settling upon that land by the Mexicans. How do you know they were Mexicans?

A. They were the natives of Mexico.

Q. Did they ever say anything about any Indians in that country?

A. They did not.

Q. What particular officer was it that compelled these people to leave?

A. I never heard his name called. If I have I don't remember it.

Q. Who ordered them out?

A. The governor.

Q. The governor of what?

A. Mexico.

Q. How do you know it was the governor?

A. I have heard grandfather say so.

Q. You are sure you are right, are you?

A. Yes.

Q. How old was your mother when she went to Mexico with that colony?

A. Do not know.

Q. Where did those families come from that accompanied Dr. Heath on his expedition?

A. Cooper Co., Missouri.

Q. What became of those people that went down there?

A. I do not know.

Q. How long did they stay?

A. About a year or two.

Q. What did Dr. Heath do after he came to Missouri?

A. He farmed and made salt, I think.

Q. Did he return to Missouri immediately after he left Mexico?

A. He did.

Q. Did he bring his family with him, including your mother?

A. Yes.

165 Q. Was your mother married at that time?
A. No.
Q. How old was she?
A. Do not know.
Q. Did your mother ever tell you how old she was when she went to Mexico?
A. She did, but I don't remember.
Q. How is it, then, that you remember that your grandfather told you when you were less than five years old that it was the governor of Mexico that drove him off that land when you don't remember about how old your mother was when she was in Mexico?
A. My mother told me her age, but I don't remember.
Q. Was the information that you derived from your grandfather, your mother, and others concerning this land the same?
A. It was.
Q. Did they all say that it was the governor of Mexico that prevented them from settling on that land?
A. Yes.
Q. Did they all say that Dr. Heath took machines, agricultural implements, tools, and established in Mexico and upon this land in question, manufacturing establishments, warehouses, and a gunpowder factory?
A. They had everything that was essential to the colony, they claimed.
Q. Well, do you know what they did have?
A. I do not know what they did have. They had farming implements—stock of all kinds.
Q. What they did actually have, coming down to particulars, they never told you, did they?
A. I heard them speak of provisions and stocks of all kinds.
Q. Is there any reason why, if your expenses were paid, that you could not go to Santa Fé, New Mexico, and testify in this cause before the court?
A. I have a family, but can't very well go.
Q. Have you any small children in your family?
A. Yes; I have two.

166 Redirect:

Q. Did you mean to say or did you make a mistake when you said that Dr. Heath was not an American-born citizen?
A. I made a mistake. He is a Pennsylvania German. (Where I have said governor in this deposition I meant to say government.)

This connection is objected — by defendants.

ESTHER C. HUNTER, *Witness.*

Subscribed and sworn to before me this 15th day of April, A. D. 1893.

THOS. J. POWELL,
Notary Public.

My term of office expires 6th of May, 1893.

I, Thomas J. Powell, notary public within and for the county of Montgomery, in the State of Missouri, do certify that in pursuance of the within and annexed commission and notice came before me, at my office, in the town of New Florence, in the county and State last aforesaid, Eliza J. Bibb, Frances I. Heath, John Best, and Esther C. Hunter, who were by me severally sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid; that they were examined and their examination reduced to writing and subscribed by them respectively in my presence on the day and between the hours and at the place in that behalf first aforesaid, and their said depositions are now herewith returned.

And I further certify that Eliza J. Bibb, Esther C. Hunter, and John Best are residents of the county of Montgomery aforesaid, in the said State of Missouri.

Given at New Florence, in the county of Montgomery and State of Missouri, this 15th day of April, 1893.

THOS. J. POWELL,
Notary Public.

My commission expires 6th day of May, 1893.

167 EXHIBIT G FOR PLAINTIFFS.

Deposition of witness taken before me, W. F. Button, a notary public, to be used in an action wherein J. B. Cessna *et al. is* plaintiff- and The United States of America and The Unknown Owners of the Dona Ana Bend Colony Grant, The Mesills Colony Grant, and The Bracito Grant *is* defendant-, pending in the court of private land claims, sitting at the city of Santa Fé, New Mexico, in pursuance of the annexed order, after 10 days' notice to the Hon. Matt. G. Reynolds, attorney for the United States, and consent, as shown by letters hereto atttached, marked Exhibit (B) and (C), on July 7th, at the time therein stated, and at the office of Charles H. Tanner, U. S. commissioner, he being absent in New York, and I being a clerk and notary public in his office.

JOHN B. KEEDLE was produced as a witness on the part of plaintiff-, who, being by me first duly sworn, in answer to the interrogatories propounded, testified as follows:

Interrogatory 1. State your name, age, and residence.

Answer. John B. Keedle; forty-three years of age; Hastings, Nebraska.

Interrogatory 2. Who is your wife and what was her maiden name and when were you married?

Answer. Mary R. Keedle; her maiden name was Mary R. Sherman; were married at Monmouth, Illinois, on the 15th day of April, 1879.

Interrogatory 3. What relationship does she bear, if any, to Dr. John G. Heath, deceased?

Answer. She is his granddaughter, being a daughter of Dr. John G. Heath's daughter Eliza, who married William Sherman.

Interrogatory 4. What, if anything, do you know as to the claim or assertion of ownership by the heirs of said Dr. John G. Heath in and to a tract of land granted by the Mexican government, through the town council of El Paso, Mexico, to said Heath, in 1823?

Answer. I know that they have always told me that Dr. John G. Heath owned land in Mexico, near El Paso, Texas. We have had for many years a certified copy of the grant which was taken from the records of the United States land office at Santa Fé, Mexico.

Interrogatory 5. What have you ever heard, if anything, from the heirs and descendants of Dr. John G. Heath as to Robert
168 J. Heath and Eliza Heath having, in 1823 or 1824, gone with their father, Dr. John G. Heath aforesaid, and a colony, to settle upon a tract of land granted to Dr. John G. Heath by the Mexican government, through the town council of El Paso, Mexico, 1823, and, if anything, what did they say or claim as to said expedition?

Answer. I have heard the heirs of Dr. John G. Heath say that they went there in 1823 or 1824, with a colony of some thirty families or more, and when they went to the land there had been a revolution in that country, and they were told by the authorities there that the laws had been changed and that they would not allow Heath to stay on his land. He made repeated and continued applications to the town council and other authorities in Mexico to allow him to remain upon his land and cultivate the same, to all of which the authorities refused, and he was finally compelled to leave the country under threat of death or imprisonment for life. He had remained there for two years or more, trying to gain possession of his land. One of the reasons which the authorities gave for not letting him stay upon the land was that the law of 1823 had been repealed, this being the law under which the grant was given. Eliza Heath and Robert J. Heath went with their father to this land.

Robert J. Heath, Eliza Heath, and others who went with the colony have always told me that Dr. John G. Heath did everything to comply with the conditions of the grant. He took all the provisions, printing press, and in fact everything which he had agreed to take, and in every way and manner complied with his part of the agreement according to its terms.

Immediately after the grant was made he returned to the United States to prepare for the expedition. He returned within a year. He went ready and willing to do all he had agreed to do. He remained there, trying to occupy and cultivate the land, but this they would not allow him to do, and he was compelled to leave within a certain time under a threat of death or imprisonment for life, coming back to the United States financially ruined, the expedition having cost him $80,000. He finally died in Missouri broken-hearted, it is said, never having fully recovered from the losses sustained in this expedition.

169 It has always been claimed by Dr. John G. Heath and his heirs that he held a large estate in Mexico, and this has been of general repute in Missouri, where the Heaths have lived.

Interrogatory 6. From what they said did Heath and the parties with him go to Mexico in 1823 or 1824, and did they occupy and cultivate the land within two years from the date of the grant; and, if not, why not?

Answer. They did go in 1823 or 1824, and when they got there the revolutionary government (the parties then in power after the death of the Emperor) would not allow Heath and his families to remain on the land and cultivate it, claiming to Heath that the laws had been repealed as the reason that they would not allow him to do so.

The town council at El Paso notified Heath that he could not remain and that he must leave the country or suffer the consequences, which would be death or imprisonment for life, and he was not to return under threats of like punishment, and he was afterwards afraid to do so. These are the facts as I have obtained them from the heirs of Dr. John G. Heath.

Interrogatory 7. Did you ever see an affidavit of Robert J. Heath relative to this land grant, the expedition; and, if so, has the original been lost and have you a copy of the same? If so, add a copy to your deposition.

Answer. I did see an original affidavit relative to his going to Mexico in 1823 or 1824, in company with his father and others. It was shown to me by E. Parmer or R. H. Mansfield, they having charge of this case at that time (in 1882 or 1883). I knew it was genuine from the signature and it was acknowledged before the clerk of the court at Shreveport, Louisiana, and that the same bore his official seal, the same being clearly marked thereon. I have a true and certified copy by E. Parmer, of St. Louis, Missouri. I know that this is a true copy of the original.

The original has been lost. We have repeatedly tried to find it. The last we heard of it, it was sent to Mr. Jones, who was then interested in the case as an attorney. Jones has been dead for
170 some years. After repeated efforts this paper cannot be found among the papers of Mr. Jones.

A true copy of this affidavit is hereto handed you to be made a part of my evidence and marked Exhibit (A).

Inter-ogatory 8. What else, if anything, of importance in this case do you know? Please state the same fully as though particularly interrogated.

Answer. I have made repeated and continued efforts to try and find some one who went with Heath and his colony, but at this late day it is impossible to find living witnesses who have personal knowledge of the making of the grant and what Heath did in his efforts to occupy and hold this land and why he was driven from the same.

(Signed) JOHN B. KEEDLE.

I, W. F. Button, a notary public within and for the county of Adams, in the State of Nebraska, do hereby certify that the above-named John B. Keedle, witness, whose name is subscribed in the foregoing deposition, was by me first duly sworn to testify to the

truth, the whole truth, and nothing but the truth ; that the foregoing deposition by him subscribed was reduced to writing by me and was by said witness subscribed in my presence and was taken at the time and place specified in the order hereto attached, and the taking of said deposition was done on the 7th day of July, 1893.

W. F. BUTTON,
Notary Public.

EXHIBIT (A).

STATE OF LOUISIANA, }
Parish of Caddo. }

Copy of the Affidavit of R. J. Heath.

Before the undersigned authority personally appeared R. J. Heath, who, being by me first duly sworn according to law, deposes and says that he is 67 years of age and a resident of Shreveport, Caddo parish, Louisiana ; that he is a son of John G. Heath,
171 deceased ; that some time in the year 1822 his said father became the owner, through the government of Mexico, of a colony grant of land located in the province of New Mexico, said grant being known as the Bracito grant, the center of which is on a small island in the Rio Grande river 30 miles, more or less, above El Paso, Texas, and measuring five leagues in length and five leagues in breadth. Affiant further says that the grantee, his father, stipulated in said grant to colonize the land with American citizens; that the grantee thereupon returned to the United States; that he organized a company of colonists, in accordance with the provisions aforesaid, composed of families, mechanics, artizens, and farmers, and that he also employed a printer and purchased a printing press, also a large quantity of agricultural implements and machinery and all necessary supplies and paraphernalia for the needs of a colony, and that with this colony and material aforesaid he crossed the boundary of the United States, passed into Mexico, and reached the port of Soto La Merene.

That affiant was one of the party, and that after the arrival at said place the Emperor Iturbide was put to death, when the country was thrown into a state of revolution. He further says that the Mexican government as then organized refused to permit the said grantee and his colonists to occupy said grant of land ; that said grantee and his colonists remained in the country for a long time, ready and anxious to occupy and improve said grant, and declared to the authorities their desire to occupy the same ; that they demanded possession and insisted upon carrying out the provisions and stipulations as aforesaid contained in the said grant or conveyance ; that they waited there through three years in the hope that the Mexican government would accede to them the rights they had acquired to take possession of and hold the land aforesaid, and that at the end of that time the authorities of the government of Mexico ordered them to leave the country under pain of imprisonment,

and they were compelled and forced by reason of such order to quit the territory of Mexico and return to the United States.

Affiant further says that the grantee, his father, and his colonists during their stay in Mexico in the attempt to locate upon said
172 land were persecuted and threatened and the grantee was robbed of all his property by the peop-e of that government, and that the property so taken from him amounted to a sum not less than $80,000 (eighty thousand dollars). Affiant says he was with the said expedition all the time it remained in Mexico, his personal knowledge of all the facts stated in this affidavit, and that the same are true in every particular.

R. J. HEATH.

Sworn to and subscribed before me on this 19th day of May, 1882, at Shreveport, State of Louisiana. In testimony whereof I have hereunto set my hand and affixed the seal of the court.

[SEAL.] W. P. FORD, *Clerk.*

I certify that the foregoing is a true copy of the said affidavit of R. J. Heath; that I wrote it out from the original in order that I might send the original to Mr. Jones, at Seneca, Missouri. In testimony whereof I have hereto set my hand and affixed my notarial seal, at office, in St. Louis, Missouri, this 19th day of May, 1883.

ENRRIQUE PARMER.

I certify that the foregoing is a true copy of the copy of the said affidavit of R. J. Heath as written by Mr. Enrrique Parmer, of St. Louis, Missouri, and that the same was duly compared by me this 7th day of July, 1893. In testimony whereof I have hereunto set my hand and affixed my official seal this 7th day of July, 1893.

W. F. BUTTON,
Notary Public.

173 EXHIBIT H FOR PLAINTIFFS.

Depositions of witnesses taken before me, Charles H. Tanner, United States commissioner in and for the district of Nebraska, United States of America, in an action now pending in the court of private land claims at Santa Fé, New Mexico, wherein J. B. Cessna *et al.* are plaintiffs and The United States is defendant, case No. 59, in pursuance of the annexed commission and at the time and place therein stated, depositions taken upon the interrogations and cross-interrogations hereto attached.

Said plaintiff- produced the following witnesses in their order, to wit:

MARY R. KEEDLE, who, being by me first duly sworn, testified as follows:

Q. State your name, age, and residence.

A. My name is Mary R. Keedle; I am 45 years of age, and I reside in Hastings, Nebraska.

Q. Are you a relative of Dr. John G. Heath; and, if so, what relation?

A. I am a granddaughter.

Q. Who was your mother, and what relationship did she bear to Dr. John G. Heath?

A. She was Eliza Heath; she married William Sherman; she was a daughter of Dr. John G. Heath.

Q. How many heirs, sons and daughters, had the said John G. Heath, and who were they, if you know?

A. There were five—Robert Heath, son of Dr. John G. Heath; Eliza Heath, daughter of Dr. John G. Heath; Margaret Heath, daughter of Dr. John G. Heath; Joseph Heath, son of Dr. John G. Heath; Harriet Heath, daughter of Dr. John G. Heath. These parties are all dead. Eliza Heath had six children—Mary R. Keedle, Esther C. Hunter, Harriet and Adalaid, Sarah Scott, and Robert Sherman. Harriet and Adelaid died at the age of seventeen and thirteen without heirs. My sister, Sarah Scott, is dead, and left Charles W. Scott and Alice Woods. Charles W. Scott is dead, but left two children living and his winow. His widow's name is Alice M. Scott and the children's names are Lily E. Scott and Lucretia Scott.

Q. Where is said Dr. John G. Heath buried; were you ever at his grave; and, if so, who took you to it?

A. Over on the La Mine river, near Boonville, Cooper
174 county, Missouri. I was there once; taken there by my mother and father.

Q. Did your mother, Eliza Sherman, leave a will?

A. No.

Q. What do you know, if anything, as to Dr. John G. Heath's having in the year 1823 obtained a grant or tract from the Mexican government through the town council of El Paso, Mexico?

A. I have heard him say so many a time.

Q. Where was this grant located?

A. It is located near *located near* El Paso, Texas, but I do not know exactly where the grant is.

Q. Did you ever hear your mother or other heirs and parties claiming interests in said land talk about it; and, if so, what did she or either of them say about the matter?

A. Yes, sir; many a time. She said that they had a land grant down there, and she did not know but what they could get it some time. Heath took a lot of colonist- there to settle the land, and finally when he got there they were driven off the land by the Mexican authorities—the grantors. There was a revolution in the country, the Emperor had been shot, and they were compelled to leave the country under penalty of death.

Q. What, if anything, did you ever hear your mother say as to having gone with her father, Dr. John G. Heath, in a colony to Mexico in 1823 or 1824 to settle and occupy this grant or tract of land above referred to?

A. She told me that she had gone. She said that they made

baskets and put one in one and — the other basket and swung them over a mule and rode along in that way.

Q. From the information obtained from your mother did they settle on the land; and, if not, why not?

A. I don't know whether they ever settled on it or not, but they were driven off it. They went on the land, but were driven off by the authorities of the Mexican government after the revolution. They staid there two years with unsuccessful attempts to cultivate their lands and made repeated applications to the authorities to allow them to stay there, but they were refused. They stole their horses and cattle and reduced the expedition to poverty, and
175 my grandfather, Dr. Heath, never recovered and was ruined financially. I know this by hearing my mother and uncle, Robert Heath, and grandfather talk about it.

Q. Did you ever hear your uncle, Robert Heath, speak of this grant; and, if so, what did he say in relation to it?

A. I have, and about the same that I have given in my last answer.

Q. What, if anything, did you ever hear Robert J. Heath say as to his having gone with his father and a colony to Mexico in 1823 or 1824 to occupy and cultivate the land granted to Dr. Heath by the town council of El Paso, Mexico, and what, if anything, did he say as to the actions of the grantor and the government of Mexico, whether the said colonists and your uncle were permitted or not permitted to remain upon the land granted and in the country?

A. I have heard him say that he went with his father to Mexico in 1823 or 1824, and they were not permitted to remain upon the land, but were driven therefrom.

Q. What religious faith or church did said Dr. John G. Heath and his heirs and descendents belong to?

A. They were Catholics.

Q. In what religious faith were you and the other relatives of said Dr. John G. Heath raised and educated?

A. Catholics.

Q. Have you ever seen the original title papers of this grant of land given to Dr. John G. Heath or do you know what has become of them?

A. I have not and do not know.

Q. What else, if anything, of importance in this case do you know pertaining to the case? Please state the same as though particularly interrogated.

A. I know that Dr. Heath spent a large amount of money in the expedition. I have heard them say it was something like $75,000.00. He staid there about a year more than his wife. He sent his wife back after he had been there about a year, and he was finally ordered to leave under penalty of death—that is, being shot within a certain time if he didn't leave. I frequently heard Robert J. Heath and my mother say that Dr. John G. Heath took to Mexico and to this land all the colony stores, implements, and everything
176 necessary to establish the colony, and in everything on his part complied with the conditions of the grant.

Cross-interrogatories:

Q. Did you ever have any personal acquaintance with Dr. John G. Heath; if so, when did you first see him and when did you last see him?

A. Yes, sir; I have seen Dr. Heath when I was quite young. I don't remember when first I saw him or when last I saw him.

Q. Do you know whether he ever came to New Mexico of your own personal knowledge, or is your information in that respect what you have been told by others?

A. All I know of his going to Mexico is what I have heard my mother and uncle and other relatives of Dr. John G. Heath talk over in my presence.

Q. Is your testimony with reference to the will of Dr. Heath based upon your own personal knowledge of the fact or based upon what you have been told by others?

A. What I have been told by others—that is, my mother and uncle.

Q. How do you know that the parties named by you are the living heirs and descendents of Dr. John G. Heath—are the only heirs-at-law at the time of his death?

A. Simply what I have been told by my uncles, aunts, and by my mother.

Q. Were you ever in New Mexico, and did you ever see any of the property claimed in this suit?

A. No, sir.

Q. Is your knowledge and statement as to Dr. John G. Heath's having obtained a grant for land in New Mexico derived from what you have been told by others; if not, what is your specific source of information? And state fully what you have personal knowledge of and how you happened to obtain it; make your answer full.

A. I have no personal knowledge of what Dr. John G. Heath did relative to the grant of land in New Mexico; my information, such as I have, is solely from conversations that I have had and overheard of my mother and Robert Heath and the children and relatives of Dr. John G. Heath.

Q. Where were you taken and by whom and shown what is claimed to be the grave of Dr. John G. Heath, and when was he buried at that point?

177 A. I think I was taken to his grave in 1851 or 1852 by my father and mother. I remember the fact distinctly, as we drove in a wagon with white canvas top. As to when he was buried, I don't remember the exact time.

Q. Is not your knowledge of the location of the grant claimed based alone from what you have been told by others?

A. Yes, sir.

Q. If your mother told you she had been to New Mexico with Dr. Heath, when did she first go there and how long did she stay and when did she return; was she ever in New Mexico more than once?

A. She told me she first went there in 1823 or 1824; that she remained one year, at which time she returned, leaving Dr. John G.

Heath. He came back about a year thereafter. She never claimed to have been in New Mexico more than the one time.

Q. Why did she leave New Mexico and come back to the States?

A. I do not know except as answered in previous answers.

Q. Who was Robert J. Heath, and is he living or dead; if not living, when and where did he die?

A. Robert J. Heath was the son of Dr. John G. Heath; he is now dead; he died in San Antonio, Texas, in 1886.

Q. As a matter of fact, all you know about this matter is what you have been told about it by others, is it not?

A. As to the grant and in fact all things that he did relative to the grant, my only knowledge to that is what has been told me by my mother, Robert J. Heath, and the other children. As to having met Dr. John G. Heath and as to going to his grave and as to the place where he is buried and as to Robert J. Heath's being dead and as to the heirs and relatives of Dr. John G. Heath, I know of my personal knowledge, but as to the grant, all I know of it is what I have been told by persons who claimed to know.

Q. You do not pretend to have any personal knowledge of the existence of this grant or its location, boundaries, area, or occupation, do you? If you answer "yes," what personal knowledge have you, when did you obtain it, under what circumstances did you receive it, and where?

A. I have no personal knowledge of the existence of this grant or its location, its boundaries, its area, or occupation.

178 Q. All you know of the religious faith of Dr. John G. Heath is what you have heard others say, is it not?

A. Yes, sir. But I know furthermore that all his children were Catholics, and all of his children and I myself was educated at St. Charles Catholic convent, Missouri.

Q. Did you ever see as a matter of fact the alleged original title papers to this grant; and, if so, in whose possession were they at the time you saw them and where were they? If you saw them did you read them? How many papers were there and whose names were signed to them? Can you read or write Spanish? Can you speak Spanish?

A. I never saw what purported to be the alleged title papers to this grant or any other paper relating to the grant until copies were shown me by my husband, John B. Keedle, some time in 1882, I think. I don't remember how many papers there were or whose name was signed to them. I cannot read or speak Spanish.

Q. If you saw what purported to be the original title papers to this grant or any other grant, how did you happen to see them?

A. They were shown to me by my husband some time in 1882 or 1883 through Judge O'Neil, from Chicago. At least, that is what my husband showed me.

MARY R. KEEDLE.

Witness:
S. W. KEEDLE.

I, Charles H. Tanner, United States commissioner within and for the district of Nebraska, United States of America, do hereby certify that Mary R. Keedle was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by her set forth were reduced to writing by M. A. Martigan, Jr., who is not interested in the suit, in my presence and in the presence of the witness, and were respectively subscribed by the said witness in my presence, and *was* taken at the time and place in the annexed notice specified, and that I am not counsel, attorney, or relative of either party or otherwise interested in the result of this suit, and said depositions were commenced at the time in said notice specified and continued by adjournments from time to time as above specified.

CHARLES H. TANNER,
United States Commissioner for the District of Nebraska.

179 UNITED STATES OF AMERICA:

I hereto attach interrogatories direct and cross-interrogatories which accompanied commission, interrogatories marked "Exhibit One."

Fees for taking deposition, $7.50, paid by plaintiff J. B. Cessna.

C. H. TANNER,
U. S. Commissioner.

180 EXHIBIT I FOR PLAINTIFFS.

In the Court of Private Land Claims, Sitting at the City of Santa Fé, New Mexico.

J. B. CESSNA *et al.*
v.
UNITED STATES *et al.*

Deposition of Maj. Horatio H. Hughes, of New Franklin, Mo., taken by me, a notary public in and for the county of Howard, Mo., upon interrogations.

Maj. HORATIO H. HUGHES, being first duly sworn, testifies as follows:

Interrogatory 1. State your name, age, and residence.

Answer. My name is Horatio H. Hughes; age, eighty-two; reside in New Franklin, Howard Co., Mo. I have lived in Howard county, Mo., since 1820, except when temporar-y absent in the army.

Interrogatory 2. Did you know Dr. John G. Heath in 1822, 1823, and 1824, and subsequently?

Answer. I did. I was then living on my father's farm three miles from what is now known as the town of New Franklin and five miles from Franklin, a town and landing there on the Missouri river, just opposite where Boonville was subsequently located. I met and saw Dr. John G. Heath there and at my father's house a number of times

in the twenties. Franklin was subsequently swept away by a flood, and New Franklin started some two or three miles away.

Interrogatory 3. What, if anything, do you know as to Dr. John G. Heath going to Mexico in 1822; and, if he went, when did he return and for what purpose?

Answer. Dr. John G. Heath went to Mexico in 1821 or
181 1822; returned in 1823 or in 1824 for the purpose of getting up a company to go with him to Mexico to settle upon and establish a colony on a tract of land near El Paso that was granted to him by the Mexican government.

Interrogatory 4. Please state fully what you know, if anything, of Heath's colony and their going to Mexico in 1824.

Answer. Dr. John G. Heath was here the latter part of the yaer 1823, and I think the company left for Mexico in the spring or summer of 1824. There were in the company one hundred or one hundred and fifty persons, men, women, and children; believe there were over thirty different families; they had five or six flat-boats, upon which they went down the river. Ascending, to my recollection, they had a printing press, medicines, stores of all kinds, farm implements, machinery for making of clothing, and other machinery suitable to that age. I remember hawling and selling them a load of flower.

My father at that time owned a mill and distillery, and I took a load of flour and sold it to Dr. John G. Heath in 1824, just before he started with his colony to Mexico. They told me at that time they were going to Mexico to settle or colonize a tract of land granted to Heath on the Rio Grande river, near El Paso, Mexico. I saw their preparations and knew of them getting ready, but all I know of where they went and the object of their going was what Dr. Heath and others of the company told me; what they had and took along with them would start and support a go-d-sized colony; from the preparations I saw and what they said at the time, they evidently intended to settle, remain, and become citizens of Mexico, and to occupy and cultivate the land granted to Heath.

Interrogatory 5. Please state fully what, if anything, they told you at the time of their going relative to establishing their dimicile or home in Mexico.

Answer. They said a tract of land was granted to Heath, and he was to settle a number of families upon it and cultivate the land, and that they were going there for that purpose—to carry out Heath's contract. This I got from Dr. John G. Heath and parties of his company.

182 Interrogatory 6. At that time what acquaintance, if any, had you with Arthur Sherman, William Stewart, and Moses Heath; and, if so, did or did not they or either of them go with Dr. John G. Heath's colony to Mexico?

Answer. I did know them, but I do not remember if Stewart's name was William or not; these parties went with Dr. Heath's colony or company.

Interrogatory 7. What relation, if any, was Moses Heath to Dr. John G. Heath?

Answer. They were brothers.

Interrogatory 8. Did or did not Dr. John G. Heath and others of his colony return; and, if so, when?

Answer. Dr. John G. Heath and some others, who went with him to Mexico, returned in a year or so.

Interrogatory 9. When they returned what, if anything, did Dr. John G. Heath and others of his party tell you as to the reason they did return and did not remain in Mexico?

Answer. They said when they got to Mexico there had been trouble and the revolutionary forces had been successful in overthrowing Iterbidie's government, under which the grant to Heath had been made, and that the revolutionary government would not let them occupy and cultivate the land granted to Heath, would not let them remain and settle there, and drove them off under the penalty of imprisonment or death; that this Government, as then organized, tried to undo all that had been done under Iterbidie's reign, and that they claimed the law under which the grant had been made was repealed, and that they would not let them occupy and cultivate the land or remain and become citizens; that
183 they stayed there during part of the years 1824 and 1825, and did all on their part to fulfill Heath's contract, but the authorities then in power would not let them remain. They returned without any property and said that everything had been taken from them in their driving of Heath and his party out of the country.

They further said that on account of the treatment by the Mexican authorities, as then existing after the revolution and representing the same authority that had previously made the grant, it was impossible for them to remain in Mexico and occupy this land, and for this reason they left.

Interrogatory 10. From what you knew and saw at the time of the preparations for their journey and what you learned subsequently as to similar voyages, what do you say was the cost and expense of Heath's colony and expedition?

Answer. It must have cost him over sixty or seventy thousand dollars. I partly judge of this for the reason that some time after this date, as an officer, I shipped and went with companies and regiments of soldiers to Florida and Mexico; also shipped loads of horses to same points.

Interrogatory 11. Were you ever on this bracito or tract of land in the Rio Grande river some forty miles northwest of El Paso, granted to Dr. John G. Heath; and, if so, when and what were the circumstances?

Answer. In 1846 and 1847 we fought a battle on the bracito tract of land. I was at the time captain in Colonel Donaphan's regiment of Missouri volunteers. We had a fight with the Mexicans here and drove them back into El Paso and from there to Chauwau.

Interrogatory 12. What further do you know relative to this grant to Dr. John G. Heath or his colony? If anything of benefit to this case, please state the same as though particularly interrogated.

184 Ans. I have lived in this county since I came here in 1829. Farming has been my general occupation; sold my farm some years ago and now live in the town of New Franklin. As I was too old to work and look after my farm, thought the interest on the money was better for me. I am a stockholder in the Bank of New Franklin. I have been in the army frequently. I was in the Iowa war. Then went as major to Florida in 1836 & '7; was captain in the Mexican war in 1846 and '7 and last four years major in the war of the rebellion.

Ever since 1821 I knew Dr. John G. Heath. He was a friend and acquaintance of my father. Before Heath went to Mexico he was said to own considerable land in different counties and was regarded as a man of considerable means for that time; was quite wealthy; Heath's family—wife and several children—went with him to Mexico. After he returned from Mexico the second time Heath was more or less in this and adjoining counties. He used to own and be in possession of the Salt Spring wells near the line of Cooper and Saline counties. I think Dr. John G. Heath died in 1851 or '52 and is buried on the Lamino river, Cooper Co., Mo.

I further state that after we returned from the Mexican war, in 1847, Dr. John G. Heath and myself often talked of the battle of the Bracito, and he claimed the land there where the battle was fought belonged to him.

That it had been granted to him by the Mexican government under Iturbide; that the revolutionary authorities that overthrew his government drove them off and would not let them settle on the land on account of their hostility to everything during Iturbide's reign.

At all times he claimed this land, saying that he had fulfilled his part of the contract; that they went there to settle, locate, and make Mexico their home, but that they were wrongfully driven out; being financially ruined, returned to the United States, and that he hoped one day to be able to reclaim and get back his land.

HORATIO H. HUGHES.

185 Subscribed and sworn to before me on the day, at the place, and within *in* the hours first aforesaid.

E. E. DUNAWAY,
Notary Public.

186 J. B. CESSNA *et al.* *vs.* UNITED STATES *et al.* } No. —.

Cross-interrogatories to be Propounded to Horatio H. Hughes.

1. Have you any personal knowledge of the facts about which you have testified? If so, how did you happen to obtain it?

Ans. What I have stated in my chief examination is from personal knowledge, except what is there stated or indicated to otherwise. I got these facts from observation, seeing and knowing them when they occurred just as I have stated.

2. If your knowledge is from what you were told by others, please state when and by whom were you informed.

Ans. The hearsay evidence referred to was told me by John G. Heath, Moses Heath, Arthur Sherman, and other members of this colony and was told me in the spring of 1824, in business transactions during their preparations for their departure to Mexico.

3. If to interrogatory No. 5 you answer yes, please state whether your information was hearsay or of your own personal knowledge.

Ans. What I have stated in my answer to the 5th interrogatory was hearsay. That and all other hearsay evidence was told me by John G. Heath and the parties with him while they were preparing to start on their journey to Mexico or had just returned, and was stated in matters of business they were transacting in their preparations for that purpose.

4. If to interrogatory No. 6 you answer yes, how do you know Sherman Stewart and Moses Heath or either of them went with a so-called Dr. John G. Heath's colony to Mexico, and how do you know that Dr. Heath ever took a colony to Mexico?

Ans. I had a personal acquaintance with Sherman Stewart and Moses Heath. They were in the company during the time of their preparations for their departure. They were in the crowd
187 on the boats and said where they were going. As to knowing that Dr. Heath took a colony to Mexico, I did not go with them. I know he got up a company for that purpose. I saw their preparations. They had a printing press, stores, goods, and provisions of all kinds, different farming implements, machinery, &c. They were quite a while getting together and getting ready. They said where they were going and what they were going for—to live in and become citizens of Mexico, to settle on and cultivate a tract of land granted to Dr. John G. Heath. They were about ready when I delivered the load of flour. Their boats were being loaded, and then very soon after they left, going down the river and, as they said, to old Mexico.

5. How do you know that Dr. John G. Heath ever went to Mexico or ever returned at any time?

Ans. As to Heath's going and returning from Mexico, I was not at any time with him. I only knew this from what he said when he went and returned, and also from the further fact of having been at the battle of the Bracito, upon the tract of land granted by the Mexican government. From what he said and what I saw I knew the Bracito, where the battle was, was the land he claimed.

6. If to interrogatory No. 9 you answer in the affirmative, who told you anything about it, and when and where was it told you?

Ans. Dr. John G. Heath, Moses Heath, and others of the colony told me what I have stated in answer to interrogatory 9 at Old Franklin, Mo., immediately after they came back in 1825 and 1826, and also at different times down to Heath's death.

7. If to interrogatory No. 10 you answer in the affirmative, how can and how do you estimate the costs and expenses?

Ans. I estimate the cost from what I saw Heath had bought and gathered together and take with him to Mexico and the necessary

expenses of such a trip at that time, and then from the fact that some years afterwards, as captain, I took a company of soldiers to Mexico, and knowledge of the expenses of such a company to that country.

8. All you know about this matter is what you have been told by others?

188 Ans. No; that part of my evidence is clearly distinguished as such in my direct and cross examination, I saying in my examination what is hearsay; the rest is from personal knowledge and observation.

Q. Are you directly or indirectly interested in this claim or the result of this suit? If so, how?

Ans. I am not; have no interest, directly or indirectly, in this claim or the result of this suit.

HORATIO H. HUGHES.

Subscribed and sworn to before me on the day, at the place, and within the hours aforesaid.

E. E. DUNAWAY,
Notary Public.

189 EX. J FOR PLAINTIFFS.

Deposition of James Bryan.

In the United States Court of Private Land Claims.

J. B. CESSNA *et al.* *vs.* UNITED STATES *et al.* } No. 59.

Interrogatories submitted to James Bryan, by agreement of counsel hereto attached, this 19th day of June, 1894.

1st interrogatory. State your name, age, and place of residence.

Answer. My name is James Bryan; I live in Nevada, Mo.; age, 88 years; was born July 29th, 1806.

2nd interrogatory. Where did you live in 1822, 1823, 1824, and 1825?

Answer. I then lived in St. Charles county, Mo., about twenty-five miles west of St. Charles and five or six miles from the Missouri river.

3rd interrogatory. Did you know at that time Dr. John G. Heath, and what acquaintance did you have with him?

Answer. I knew him very well. He was a great friend of my father. Heath often stopped at our place on his way from St. Charles and St. Louis to his home, and I was often at Heath's salt well, in Saline Co., Mo.

4th interrogatory. At that time what was Dr. John G. Heath's standing, influence, position, and financial circumstances?

Answer. Heath was a very prominent, influential, and wealthy man. He was a member of the first constitutional convention in

Missouri, in 1820; was often talked of as a candidate for governor of the State, but would not take the position. Heath was wealthy; owned a great deal of land in different counties of the State and a number of slaves.

5th interrogatory. What, if anything, do you know as to Dr. John G. Heath going to Mexico in 1824, and, if he did go, did he take others with him? Tell all you know about the matter—when and where they started from, when and under what circumstances you saw them, and who and how many went with him.

Answer. In 1824 Heath organized at Old Franklin, Mo., a company to go with him to old Mexico to settle on and cultivate land granted to him by that government. They came down the Missouri river in six or eight boats and stopped at the mouth of the Semosage creek, where they stayed a day or so to take in provisions, &c. Heath, his wife and family came out and stopped one night at my father's. He bought three or four wagon-loads of flour and bacon from my father, and I helped to haul and load them on their boats. There was a large company of people with him—over one hundred and fifty at least, men, women, and children. Most of them were from Old Franklin, which was one hundred and fifty miles from where I then lived; only remember now the name of one of them, a man by the name of —— Batties, and family—wife and several children. A number of neighbors and friends of ours joined Heath and went with his company to Mexico—Jacob Dust, Charles McLain, Abraham Dust, with family of ten or twelve—six or eight boys—and Adam Zumalt and large family. Zumalt and Abraham Dust and families did not return; stayed in Texas. Jacob Dust came back, stayed awhile, and he and family then went to Texas, and he was the Lieutenant Dust who was killed in one of the Mexican massacres in Texas. Heath took with him to Mexico his wife and four children, if not more—two boys and two girls. The oldest was a boy named Robert. I saw them all at the boats in the river, and there must have been over thirty different families. Heath and the parties with him at this time said they were going to Mexico to settle, live on and cultivate his tract of land there.

I remember these fact- and the time when they occurred for the reason that I got from Charles McClain when he went away a very fine dark-bay blooded stallion; I trained, run and won races with him. I was then not of age, and my father helped me to get the horse. McClain returned about two years afterwards and got the horse back again.

190 6th interrogatory. Did Heath and others of his party return; and, if so, what did Heath tell you upon his return as to the reason for not staying in Mexico?

Answer. Heath and most of the others came back about two years afterwards, and at the time said they were driven off the land and out of the country by the Mexicans—were not allowed to remain there on account of a revolution or trouble in the Mexican government, the Emperor having been killed. Abraham Dust and Adam Zumalt and families did not return; remained in Texas.

7th interrogatory. If you know anything further of importance in this case, please tell the same as thoug- particularly interrogated.

Answer. Have since thought of some of the properties Heath owned in 1824. He had a number of farms in St. Charles county and town property in St. Charles—houses and lots, &c.; had several Spanish grants in St. Charles county, Mo., and also owned a valuable farm or ranch at Herman, Missouri. Heath's salt springs were very valuable. At that — he was doing a good business. He also had a large tract of bottom land at the mouth of Vaus river; some 1,700 acres. My father wintered horses and cattle on this land and I helped take care of them and know that my father talked with Heath about trading for this land, but mother interfered. Heath's brother Robert was partner in some of this property.

his
JAMES x BRYAN.
mark.

Witnesses:
JOHN T. BIRDSEYE.
LOVINA MOORE.

Subscribed and sworn to before me on this 19th day of June, A. D. 1894. My term as notary will expire Nov. 9th, 1897. Witness my hand and official seal, at my office, in Nevada, Mo.

{ Seal of John T. Birdseye, Notary Public, Vernon Co., Missouri. }

JOHN T. BIRDSEYE,
Notary Public.

Cross-interrogatories Propounded to James Bryan.

1st interrogatory. What was your business in 1823, 1824, and 1825, and what is your business now?

Answer. I was then working at the stone and brick-laying business; also engaged in helping to survey. I am now almost blind and old, doing no business except a little work around home; live with my grandson, Albert White, at Nevada, Mo., and on my own property; also have two sons and two daughters living in Nevada, Mo., with whom I spend some time.

2nd interrogatory. How did you happen to know Dr. John G. Heath?

Answer. My first recollection of John G. Heath was at my father's, in 1812 or about that time—at the commencement of the Indian war in Mo. He stayed at my father's over night and they talked of the Indian trouble. I remember I was very much frightened. I knew Heath from then until his death. He often stayed with my father, who then lived in a large brick house on the road from St. Louis to Old Franklin and Heath's salt springs.

3rd interrogatory. Where did he live and where did you live?

Answer. Heath lived at that time at his salt springs, in Saline county, Mo., and I lived at my father's, Jonathan Bryan, in St. Charles county, Missouri.

4th interrogatory. What opportunity had you for knowing his financial condition?

Answer. Me hearing of Heath and my father often talk of their business matters and about trading for different tracts of land—father wanted to trade, but mother would not consent to leave our home—and again Heath was always spoken of about 1820 and 1824 by every one as being the wealthiest man in all that country, and I at that time used to help Nathaniel Boone and my brother-in-law, Alexander McKinney, Government surveyors, to make sur-
191 veys of lands in that country from the time I was sixteen years old, and in this way I got knowledge of some of Heath's lands and a better personal acquaintance with him. I was assistant and deputy surveyor in St. Charles county for over thirty years and was county surveyor in Vernon county, Missouri, for over fifteen, or deputy part of that time.

5th interrogatory. Are you certain that Dr. John G. Heath went to Mexico in 1824?

Answer. I did not go with Heath to Mexico. I know that Heath and party prepared and started for t-ere in 1824, just as I have said in my examination. Heath and they at the time they started said they were going to Mexico to settle and live upon a tract of land granted to Dr. John G. Heath by the Mexican government and to make it their homes. Heath said he had been in Mexico; had become a citizen and owner of lands there, and that they were going there to live upon the same, and when they returned, in about two years afterward, they all said they had been there and would have remained and gotten homes from Heath had they not been driven off on account of the revolution or trouble in the Mexican government. They further said that after the overthrow of the Emperor Iterbide no Americans were allowed to remain in Mexico, especially near El Paso; the political feeling was intense against foreigners generally, and especially Americans, at that time. Heath went first to Mexico in 1821 or 1822. I knew of his going at the time.

6th interrogatory. Is not all the information you have on that subject derived from what Dr. Heath told you himself or from what was told you by others?

Answer. The information as to Heath and company being in Mexico and what occurred there is derived from what they told me in their preparations for leaving and at the time of their going and returning; all my other evidence is what I saw and knew personally.

7th interrogatory. Have you had occasion to discuss these facts with any one since 1824 until recently, and how is it that your memory is so good upon this subject?

Answer. Yes; very, very often; might say dozens of times with Dr. John G. Heath and many of those who went with him; with my father and brother, Elijah Bryan, and with no one very recently except my daughter, Lovina Moore, & other members of my family, until about three weeks ago Mr. Cessna came to see me on the subject. All the parties I have named are now dead except my brother, Elijah Bryan, who is over ninety-five years of age. He

is sick, feeble, deaf, and childish, having lost his mind and memory for some years past*ed*. Since those who were then living have all died have not talked much about the matter. The getting of the horse from McClain was one of the chief incidents that helps me to remember the facts as well as I do, and then the going of Heath and his party to Mexico attracted considerable attention at the time.

8th interrogatory. Have you any interest in the property or have you ever had any interest in it?

Answer. No; none whatever.

his
JAMES x BRYAN.
mark.

Witnesses:
JOHN T. BIRDSEYE.
LOVINA MOORE.

Subscribed and sworn to before me this 19th day of June, 1894. My term as notary will expire Nov. 9th, 1897. Witness my hand and official seal, at my office, in Nevada, Mo.

{Seal of John T. Birdseye, Notary Public, Vernon Co., Missouri.}

JOHN T. BIRDSEYE,
Notary Public.

192 EX. K FOR PLAINTIFFS.

Deposition of Charles Woodruff.

In the Court of Private Land Claims, Sitting at Santa Fé.

J. B. CESSNA *et al.*, Plaintiffs,
vs.
UNITED STATES *et al.*, Defendants. } No. 59.

Deposition of witness produced, sworn, and examined on the 19th day of January, in the year of our Lord 1894, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of that day, at the residence of Charles E. Woodruf, in the county of Saline and State of Missouri, before me, R. M. Reynolds, notary public, in a certain cause now pending in the said court in the —— of ——, in the State of ——, between J. B. Cessna *et al.*, plaintiffs, and United States *et al.*, defendants, on the part of the plaintiffs.

Present: No one on behalf of the plaintiffs, and no one on behalf of the defendants.

CHARLES E. WOODROOF, of lawful age, being produced, sworn, and examined on the part of the plaintiffs, by interrogation deposeth and saith:

1st interrogatory. State your name, age, and residence.

A. My name is Charles E. Woodroof; age, 71; residence, Arrow Rock township, Saline county, Missouri.

2nd interrogatory. Did you know Dr. John G. Heath and his family; and, if so, when did you first become acquainted with them?

A. I knew Dr. John G. Heath and his family ever since 1836 or 1837. I was then living in Warren county, near the Montgomery County line; soon after got to running on a boat on the Missouri river and often at the mouth of Gasconade river, where Heath resided. I knew his sons, Robert J. and Joseph Heath; also his daughters, Eliza, who married William Sherman; Herriet, who married Samuel Guiler, and another, whose name I do not now remember.

3rd interrogatory. What do you know as to the said John G. Heath owning a tract of land called the Bracito, granted to him by the Mexican government, through the town council of El Paso, in 1823, situate on the Rio Grande about forty miles northwest
193 of El Paso? If anything, please state fully all about the matter.

A. Heath frequently told me about this tract of land that — been granted by the Mexican government under the reign of Iturbide, and that he was to settle it with a colony; that he came to the United States and got his colony and supplies and returned in 1824 ready to perform his part of contract fully, but that when he got there there had been a revolution, the Emperor being overthrown. The revolutionary authorities would not let him occupy it, and drove them out and would not let them remain in that part of the country. He said he had taken his family and other families there according to contract, but that the revolutionary authorities claimed that as the grant had been made under the reign of Iturbide they would not let them remain. Eliza, Joseph, and Robert J. Heath frequently told me the same thing and often told me of their trip to Mexico with their father and his colony. Heath and his family all said they had all gone to Mexico intending to settle on this land and remain there and become citizens of that country and to make Mexico their home, according to their contract, and that when they got there they were not allowed to stay. Heath frequently told me that his return to the United States was from necessity on the account of threats and acts of hurt and bodily harm on the part of the revolutionary authorities — overthrew Iturbide. He frequently told me his claim was valid and legal and some day he hoped to get back his land. This was his talk as long as he lived. He said he had wrongfully been driven off; that he had spent a great deal of money in taking his colony there and in an honest effort to settle the same; that the failure was not on his account, but on the part of authorities who made the grant; that he had lost all of his property in this expedition and returned bankrupt, but hopes some day when he was able he would get back his property. John G., Robert J., Joseph, and Eliza Heath could speak Spanish pretty well, and the- said that they learned it while there in Mexico with their colony.

4th interrogatory. Were you ever on this tract of land;
194 if so, what were the circumstances?

A. I was a soldier in the Mexican war in 1847 in Com-

pany C, St. Louis, Missouri, cavalry battalion, commanded by Colonel Easton, and in General Price's brigade. In the fall of 1847 we had a skirmish with the Indians near the Bricito. I and some others at the time we were attacked were herding some sheep. We had been here and in this neighborhood for some time. I remember that a lot of our sheep got swamped in mire and mud along the river here, and the army went away in a hurry, and we had to leave a part of our sheep there; told a few Spaniard- that were there to take them. From what Heath had told me and the description that he gave I knew that we were on his land, and so told those that were there. When I returned from the Mexican war, Heath and I frequently talked about this incident and the fact of its being on his land. He tried to sell me his grant and we made some negotiations about it, but never entered into any written contract; after having seen the land, had I the money at the time would have purchased an interest. After the death of John G. Heath, Joseph and Robert J. Heath often talked and tried to arrange with me and take possession of this land, but we did not on the account of means. John G. Heath and his heirs claimed to own this land — expressed a hope that they would get it some day, as they claimed that they had never give- it up or abandoned it, but was driven off and left of necessity of threat of imprisonment or death, after they had tried faithfully to make it their home, and that they believed that for this reason that it would come all right.

5th interrogatory. What was the character, position, and influence of Dr. John G. Heath as a man and a citizen?

A. John G. Heath was a very shrewd and intelligent man; scarcely had an equal, if any, in the State; was a leader of men all his life. He was a lawyer and a judge of the courts for many years; was an eloquent speaker and one of the best talkers I ever listened to. He had a considerable magnetic power and influence over men and was always popular with his neighbors. It was said
195 that Heath was very wealthy before he went to Mexico; had owned a great deal of land and personal property, all of which he sold before leaving; he left with his colony. This I got from Heath and others.

6th interrogatory. What further do you know relative to this grant to John G. Heath or his colony? If anything of importance or benefit to the case, please state the same fully as though particularly interrogated.

A. I can think of nothing further now.

CHARLES E. WOODROOF.

Subscribed and sworn to before me on the day and at the place in the hours aforesaid.

R. M. REYNOLDS,
Notary Public.

My term as notary public expires Dec. 10, 1894.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Cross-interrogatories Propounded to Charles E. Woodroof.

1st interrogatory. Will you please state whether the facts stated by you are of your own personal knowledge or were they derived from what others told you?

A. They are partly from personal knowledge, partly from what others told me; what is hearsay I have so stated in my examination and cannot make it any plainer by repeating it.

2nd interrogatory. If you were ever over the land claimed in this suit when was — and how did — happen to be there; what was your business there, how long did you stay, and where did you go after leaving?

A. I was a soldier in Mexican war at the time; was there and in neighborhood several weeks; then went to El Paso; stayed there until March 17, 1848, then went to Chaughua; returned to United States in fall of 1848.

3rd interrogatory. If your knowledge was derived from what others told you, whom were they, and when and where were you when they talked with you?

196 —. This is already stated in my examination — chief, and I can add nothing further except to say that was told me was generally told at Gasconade county, Missouri.

4th interrogatory. Are you directly or indirectly interested in this claim or in the result of this suit? If so, how?

A. I am not interested in any way or manner in this claim.

CHARLES E. WOODROOF.

Subscribed and sworn to before me on the day, at the place, and in the hour aforesaid.

R. M. REYNOLDS,
Notary Public.

My term as notary public expires Dec. 10, 1894.

197 EXHIBIT L FOR PLAINTIFFS.

In the Court of Private Land Claims, Sitting at the City of Santa Fé, New Mexico.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Interrogatories to be submitted to Magdalena de Carranco and Gregora Garcea on behalf of plaintiffs above named before M. C. Cameron, consular agent at Victoria, Mexico.

1 Q. Please state your name, age, and residence.

A. My name is Magdalena de Carranco; I — resident of C. Victoria, Tamaulipas; eighty-five years of age or older.

2 Q. Where did you live in 1824 or 1825?

A. I lived then in Sota la Marina, a harbor on the Marina river, not very far from the gulf of Mexico.

3 Q. Did you ever know Juan Gid or Dr. John G. Heath (American); and, if so, where and when did you know him?

A. I knowed him in 1824 or 1825, because he returned then with a colony of fifty or a hundred persons—men, women, and children—from Mexico to the United States. They had been in the northern part of Mexico, in El Paso del Norte, to settle on land, as they told me, and they were compelled to leave, and they were on their return to the United States. They remained a sufficient time. The general and other residents desired that they should take up some land there and establish themselves there, but they did not want. The most of them took a schooner or bilander and returned to America. As they could not live on the lands which they had come to settle, they did not want to remain in the country.

4 Q. Please state fully all you know or remember about Juan Gid or He-th and those with him and the reasons for recollecting same.

198 A. He was a red-haired man, or of a whitish color. He had his family with him—that is to say, his wife and various boys and girls—and a large number of other families. He had supplies and provisions, etc., etc., when they arrived first. I worked for them and I came to know Mrs. Heath and the children familiarly. It would please me greatly to see some of those persons, but, as far as I know, none of those who had been there are alive. I do not know exactly my age, but when this happened I was still a young girl. It was very near the time at which Iturbide was shot, a fact I remember well. The return of Mr. Heath and his colony was in some manner connected with the fall of Iturbide government, but I cannot exactly explain it. During the time they remained — Sota la Marina Heath and others of his companions worked in the salt lagoons. Mr. Heath and his colony may have been in Sota la Marina a short time in 1824, but I do not remember it, because I only came to know them on their return from El Paso in 1825.

5 Q. What else of importance to plaintiffs in this case do you know? If anything, please state the same fully, as though particularly interrogated.

A. I do not remember anything more just now.

MAGDALENA GALVANA DE CARRANCO.

Witness-:

F. W. GREGORY,

M. C. CAMERON,

U. S. Consular Agent, C. Victoria, Mexico.

199 In the United States — of Private Land Claims, Sitting at the City of Santa Fé, New Mexico.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Cross-interrogatories to be Propounded to Magdalena de Carvanco and Gregora Garcea.

First. Where was Doctor Heath when you first saw him and who were with him?

A. I saw Doctor Heath or Juan Heath for the first time in Sota la Marina. I do not know the names of the persons who came with him. I only know Juan G. Heath.

Second. Which way was he travelling—north or south?

A. I do not remember for certain if I saw them or not before leaving for El Paso; if not, on their return to the United States.

Third. Did you have any conversation with him in person?

A. Yes.

Fourth. Give us as near as you can the exact date when you first and last saw him.

A. I cannot say for certain—first in 1824 and last in 1825, near the first of the year.

Fifth. Do you know anything about him or his mission, except from what was told you by Doctor Heath and others?

A. I do not know more than what I said before I saw.

Sixth. Is not all the information that you have about Dr. Heath what you have heard from others and from him?

A. Yes; with the exception of what I saw when he and
200 his people were at Sota la Marina.

Seventh. Were you ever in the United States or in the province of New Mexico; and, if so, what were you doing there? And state when you were there.

A. No.

MAGDALENA GALVANA DE CARRANCO.

Witness-:
F. W. GREGORY,
M. C. CAMERON,
U. S. Consular Agent, C. Victoria, Mexico.

201 EXHIBIT M FOR PLAINTIFFS.

In the Court of Private Land Claims, Sitting at the City of Santa Fé, New Mexico.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Interrogatories Submitted to Price Cooper Before the United States Consul at Juarez, Mexico.

Interrogatory 1. State your name, age, and residence.

Answer. My name is Price Cooper; age, eighty-two years; residence, Ysleta, Texas.

Interrogatory 2. Where have you lived since 1830 or 1832?

Answer. I have lived since 1834 or 1835 at Ysleta. Ten or eleven years prior to that I was at Santa Fé, El Paso del Norte, Ysleta, Chihuahua, Mexico City, traveling as a peddler between these points; settled in Ysleta in 1834 or 1835.

Interrogatory 3. What do you know, if anything, as to a grant of land to Juan Gid or John G. Heath in 1823, made by the ayuntamiento of El Paso del Norte, situated on the Rio Grande river, northwest of El Paso?

Answer. I know that such a tract of land was granted to Juan Gid or Doctor John G. Heath in 1823 by the Mexican government through the town council of El Paso del Norte, Mexico; got my information from Gid, the town council, and others, and have often been on the land. It was known as the Brazito, situated on the Rio Grande river, about forty miles northwest of El Paso. Heath was put into possession of this land; then went back to the United States to get some people to help him cultivate the same. He returned in 1824 with his family and two hundred persons with him. They remained a short time on this land, and then, after the overthrow and death of Iturbide, they were driven off and returned to the United States. I met Heath and others on this land. He had brought many things with him—stores, provisions, machinery of all kinds, farm implements, plows, &c.

Interrogatory 4. What was the common or general reputation in that neighborhood as to the ownership of this land from the time you first knew it to the change of the Mexican government?

Answer. It was always known by all people in that neighborhood and at El Paso as the Gid or Heath grant of land.

202 Interrogatory 5. What, if anything, were you told by Ponce de Leon, Marenio Barrello, and other Mexican officers and citizens as to this grant and the cause why Heath or Gid did not remain upon, settle, and cultivate this land?

Answer. They told me that Heath was driven away and not allowed to cultivate and remain on his land because the grant had been made to him under the laws and reign of Iturbide; that after

he was overthrown they tried to undo all that had been done during his time, and for that reason did not respect Heath's title. They drove him out of this country under the threat of imprisonment or death. They said their position was that, as Iturbide was overthrown, Heath would have to leave, as he got his grant under Iturbide's law. I often heard these same parties and others say a few years after and at other times they regretted that Heath and party were not allowed to stay upon his land; that they had done wrong in driving them away.

Interrogatory 6. What else do you know of importance to plaintiff in this case, if anything? Please state the same fully as though particularly interrogated.

Answer. I was at and about El Paso del Norte more or less from 1823; traveled from Santa Fé to El Paso, Chihuahua, &c., with my brother, Richard Cooper, peddling silk, goods, &c.; worked a while for Ponce de Leon and others at and near El Paso del Norte and then settled at Ysleta in 1834–'5. I met Heath first in 1822 or 1823 at El Paso del Norte, and then at different times afterward at El Paso del Norte and on his land, the Brazito. Heath was a man of light or sandy complexion, medium size; rather a little taller than an ordinary man. He was known both as a lawyer and doctor; he was quite a talker. When he returned, in 1824, he had his wife, family, four or five children, boys and girls, and some two hundred persons with him. A boy about my age at the time was the oldest of Heath's family. There was a brother of the Doctor in the crowd that came with him; do not remember his first name now. I think there was also a man by the name of Mr. Laine or McClain, am not sure which, with him. Heath brought with him a great many things—farm implements, machinery of all kinds, stores, provisions, and a printing press. When he was driven off
203 he had to leave all his things behind him, not having the money to take them back. At the time he left he said it had cost him many thousand dollars to get here, and that it would ruin and bankrupt him to go back. Many things that Heath brought were taken from him by the Mexican people and Mexican government. I afterwards saw some of his machinery in Chihuahua. Heath was forced to leave his land under the threat of imprisonment or death. He was given a certain number of days to go away. These facts I got at the time from Heath, the town council of El Paso, and other officers of the government, and the reasons given were that Iturbide and his government had been overthrown, and that nothing done during that time should remain; that the law under which Heath's grant had been made was repealed, and that Heath should not remain. Heath and party returned to the United States by way of Chihuahua and Soto la Marina, the way they came to El Paso del Norte.

(Signed) PRICE COOPER.

Subscribed and sworn to before me this third day of August, 1894.

THEODORE HOUSTON,

[SEAL.] *U. S. Consul at Paso del Norte, Mexico.*

204 In the Court of Private Land Claims Sitting at the City of Santa Fé, New Mexico.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Cross-questions Submitted to Price Cooper Before the United States Consul at Juarez, Mexico.

Question 1. Where were you born and what was your business in 1823–'4 and what is your business now?

Answer. I was born in the northern part of Pennsylvania near the New York line; left there when a child; was in Illinois a few years, coming to El Paso when about ten or eleven years old; I am a farmer; in 1823–'4 I was a peddler.

Question second. Where did you live at that time?

Answer. I had no permanent home in 1823–'4; was travelling with my brother.

Qestion third. How did you happen to know Dr. Heath?

Answer. I met him on his land, about forty miles northwest of El Paso.

Question fourth. Do you know anything about his mission to El Paso or Mexico except from what he told you and what you heard from others?

Answer. No.

Question fifth. From whom did you ever hear anything about the land grant of Dr. Heath, and when did you first hear it?

Answer. From Dr. Heath, Ponce de Leon, Guadalupe Miranda, my brother, and others. First in 1823.

Question sixth. How did you happen to know anything about his land grant up in New Mexico?

Answer. Having met Gid or Heath in El Paso del Norte at or about the time of the grant and then passing over the land in going to and from Santa Fé.

Question seventh. Have you any knowledge in relation to Dr. Heath or land grant to him except from what was told you by Dr. Heath and others?

Answer. No; except meeting Heath on the land several times, as I have stated.

205 Question eighth. Do you know how J. B. Cessna found out that you knew anything about Dr. Heath or a land grant?

Answer. I do not.

Question ninth. State fully what he said to you on your interview with him about your knowledge of Dr. Heath.

Answer. Mr. Cessna came to my house at Ysleta, saying he wanted an interview with me relative to the Heath or Gid grant; that he was informed that I had knowledge of the matter. He asked me to state when and where I knew Heath and what I knew about the Mexican grant to him. I gave him a statement of the matter and

he said he desired to have my evidence taken to be read in court; that it was important.

Question tenth. Do you know where the land is located and what its area and extent is?

Answer. I know where the land is. It was five miles square.

Question eleventh. Have you had occasion since 1823–'4 to discuss with anybody the facts about which you testified in your deposition, and, if so, with whom did you discuss the facts and what was the occasion therefor?

Answer. John Gilette, an old settler here; John Evins, Ben. Dowell, James Magoffin, and Joe Done, all of whom are dead except the first mentioned. There was no particular reason for these conversations, except as it was a matter of general interest.

Question twelfth. Who were with Dr. Heath when you first knew him, and which way were they travelling?

Answer. He was on the grant when I first met him.

(Signed) PRICE COOPER.

Subscribed and sworn to before me this 3rd day of August, 1894.

[SEAL.] THEODORE HOUSTON,
U. S. Consul at Paso del Norte, Mexico.

206 EXHIBIT N FOR PLAINTIFFS.

In the Court of Private Land Claims, Sitting at the City of Santa Fé, New Mexico.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Interrogatories Submitted to Gregoria Herrera Before American Consul at Juarez, Mexico.

1 Q. State your name, age, and residence.

A. My name is Gregoria Herrera; I am eighty-one years and four months old; I was born in Paso del Norte, and at present I reside in Juarez, Mexico.

2 Q. Where did you live in 1823 and 1824?

A. In the years one thousand eight hundred and twenty-three and one thousand eight hundred and twenty-four I was living in Paso del Norte, Mex., called today Juarez.

3 Q. Did you ever know Juan Gid or John G. Heath, and, if so, where did you know him? Tell fully all you know about Gid or Heath.

A. I knew Juan Gid or John H. Heath in 1822, 1823, and 1824. I saw him frequently in El Paso. I met him in 1824 in El Brazito, a land which had been granted to him on the part of the Mexican government through the intervention of the ayuntamiento of Paso del Norte in one thousand eight hundred and twenty-three, on or near the place where today Las Cruces, New Mexico, is situated. At that time I passed there in company of my father, Jose Herrera;

my uncle, Cerciano Avilez, and various brothers, all of which have died. I found Gid, as said, and then I was eleven years old. I remember that a dog jumped at us, frightening the mule my
207 uncle rode, and the consequence thereof was that the mule threw my uncle to the ground. Gid or Heath, and those who were with him, did not remain a long time on their land. After the fall of Iturbide became known in this country, Heath was not allowed to go on living on -is land. The authorities of the victorious party ran him out. The new government tried to undo everything which had been done under the command of Iturbide, and as Heath had obtained his grant under the laws of Iturbide, he was not allowed to remain in possession; he was ordered to leave, threatened with jail and death. When Gid or Heath left there, he took a southern direction for Chihuahua and Sota la Marina. It was the general talk at that time, that in consequence of the downfall of Iturbide, Heath could not remain on his lan-s because they did not let him. A- I have stated, so it happened. I can give no more details; but I know that when Gid left and not remained on his land, it was on account of the downfall *od* Iturbide's government. I have no knowledge that the government, through some official act of its executive (president), has cancelled Heath's title. They took the position that as the grant had been given under the laws of Iturbide Heath could not be allowed to remain.

4 Q. What, if anything, do you know as to a tract of land situated on the Rio Grande river some forty miles northwest of El Paso del Norte, of its having been granted to Juan Gid or John G. Heath by the ayuntamiento El Paso del Norte in 1823. State fully all you know personally as to said grant, and also, what was the general repute or reputation as to the ownership of said tract of land in that country, from the date of the grant to the change of the government?

A. I know that the Mexican government through the in-
208 tervention of the ayuntamiento of Paso del Norte, bestowed upon John Gid or Heath, one "sitio" of lands, situated on the Rio Grande, northwest of El Paso del Norte, measuring five square leagues. I was not present when donation took place, but on various occasions the circumstances of the donation have been told to me by Ponce de Leon and others, and I know that it was generally known that the ayuntamient- of Paso del Norte had grant- said sitio of land to Gid or Heath, whom I saw at one time on said land, as I have stated before; and I know that from one thousand eight hundred and twenty-three until the change of sovereignity said Juan Gid was generally reputed in that country as the owner of the "sitio" of said lands. That sitio of lands was always known as the property of *of* Heath, and it was also well known that Heath with his family, and others which depended on him, were living on said land for some time in one thousand — and twenty-four.

5 Q. After the overthrow of Iturbide's government in 1824, what was the disposition of the then suc-essful government and the Mexican people at El Paso del Norte towards permitting Americans or

foreigners to live, remain upon, and occupy lands in that *or* part of Mexico?

A. As this has taken place so long ago I do not remember all the facts, but I know that before the downfall of Iturbide was known in El Paso, Gid or Heath was doing well; but immediately after the change of government Heath's troubles began; he was no longer allowed to remain on his land, but he had to leave because the law was revoked, Iturbide went down, etc. The disposition of the government which succeeded the one of Iturbide, as also of the
209 town of El Paso, in one thousand eight hundred and twenty-four, was to generally undo what had been done during Iturbide's time, and Heath havi-g been an American foreigner, and having obtained the grant under the laws of Iturbide, he was not allowed to occupy the lands of the grant, neither was he permitted to stay and live on them, for which reason he left and returned to the United States.

his
GREGORIA x HERRERA.
mark.

Witness-:
THEODORE HUSTON.
CHARLES EMIL NESCHE.

Subscribed by making his mark and sworn to before me this 2 day of Aug't, 1894.

THEODORE HUSTON,
U. S. Counsel at Paso del Norte, Mexico.

210 In the United States Court of Private Land Claims, Sitting at the City of Santa Fé, New Mexico.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Cross-interrogatories to be Propounded to Gregoria Herrera.

First. State your business, your age, and residence.

A. Farmer; eighty-one years old; reside in Juarez, Mexico.

Second. What was your occupation in 1823–'4, and what is your occupation at the present time?

A. I had no occupation in 1823–'4. I lived with my father, Jose Herrera. As I am so old I do not see and cannot work.

Third. Where did you first see Dr. Heath, and how did you happen to see him?

A. I saw Dr. Heath the first time in El Paso del Norte in 1822 or 1823; we met there.

Fourth. Have you any knowledge as to what his business was at *at* El Paso except what you have heard from others, and if you have any knowledge other than that derived from other persons, how did you happen to obtain it?

A. I have no knowledge of the matter of Dr. Heath further than I have already stated.

Fifth. Did you ever see what is claimed to be a grant to Dr. Heath?

A. I saw the grant of Heath in 1824, having been there as I have already stated, and I have been at the same place on different occasions. It was always known to all the people as the grant
211 of Gid or Heath, and all did know that the family of Heath and other depended upon him were living upon said lands in 1824.

Sixth. Were you ever on the property, and do you know anything about it except from hearsay? If so, how did you derive your information?

A. I was on the property. I met there Heath. This and what I have heard has been (constitutes) my information.

Seventh. When was the first time you ever saw Heath?

A. When I was ten or eleven years old.

Eighth. Is it not a fact that all you know about Dr. Heath and his land grant is what you have been told by Dr. Heath and others?

A. Yes; with the exception of my meeting with Dr. Heath on his "sitio" of lands.

his
GREGORIA x HERRERA.
mark.

Witnesses:
THEODORE HUSTON.
CHARLES EMIL NISCHE.

Subscribed by making his mark and sworn to before me this 2 day of August, 1894.

THEODORE HUSTON,
U. S. Consul at Paso del Norte, Mexico.

212 EXHIBIT O FOR PLAINTIFFS.

In the Court of Private Land Claims.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

Deposition of witness T. T. Teel, produced, sworn, and examined on the 8th day of June, A. D. 1895, at El Paso, El Paso county, in the State of Texas, before me, John C. Pearce, a notary public in and for said El Paso county and State of Texas, in a case now pending at Santa Fé, New Mexico, between J. B. Cessna *et al.*, plaintiffs, and The United States *et al.*, defendants, by agreement of attorneys hereto attached. Present at the taking of the said deposition, J. B. Cessna, Esq., and S. B. Newcomb, Esq.

T. T. TEEL, being produced, sworn, and examined, deposeth and says:

My name is T. T. Teel; my age, 71; I live at El Paso, El Paso county, Texas.

Q. How long have you been acquainted in El Paso and vicinity?

A. I first became acquainted here in June, 1861. I left here in latter part of July or August, 1861, and went to Mesilla, New Mexico, and remained there until 1862, when I went to San Antonio, Texas.

Q. Have you any knowledge of a grant made by the Mexican government, made in 1823, through the town council of El Paso del Norte, to John G. Heath of a tract of land on the Rio Grande river in the Mesilla valley, covering what is now known as Las Cruces, Messilla, &c.; and, if so, when and from whom did you learn of this grant? Tell all the particulars you know of said grant.

A. I never saw any grant. About 1858 a man of the name of Lorenzo Castro, who lived in San Antonio, where I then lived, who — a real-estate agent and dealt in Mexican land grants and was at this time my client and for a long time thereafter, amongst other Mexican grants he told me of a Mexican grant which was in New Mexico called the Dr. Heath grant, and also used a Mexican name for this grant, Juan Gid, and he, Castro, wanted me, amongst other things, to go in with him and litigate this grant, as this grant was not in my part of the county.

213 Q. Who was this Lorenzo Castro?

A. He was the son of the Impresario Castro.

Defendant here excepts to so much of the answer as refers to what Castro told this affiant, it being hearsay.

Q. Please state when you next learned of this grant, and state whether or not your informants were residents upon and claimants to portions of this grant.

A. I was a Confederate officer, and my term expired in the spring of 1862, and I wanted to stay upon this country and to purchase property either near Mesilla *at* this point after my year expired. I found a piece of property near and below Mesilla which was owned by a doctor; I do not now recollect his name. I was about to trade him land I had in Texas for this property. Before I made the trade I enquired of parties, men, of and about the title to this property, and among those of whom I enquired was a man called Miranda, Guadalupe Miranda, who had been under Governor Armijo—a secretary to the governor or some officer of the then governor at this time. My headquarters were at Las Cruces, and Miranda came often to see me, and so I enquired of him as to this title, he being an intelligent man. He told me, as I recollect, that the United States had not considered the titles as yet, and told me then about this Heath grant, and, of course, I declined to purchase the land up there in that condition for the land I had in Texas, which latter had good title.

Q. Did you get knowledge of this grant through other owners and settlers generally of this grant at this time?

A. I wanted to live there, and, as I recollect, I spoke to several others, and among them a merchant of Mesilla called Barela, the father, I think, of Mariano Barela; I am not positive as to any conversation about this grant with any others. I had determined in my mind to leave the country, and what I said to others are merely

impressions. I had some talk with Colonel Jones about this grant, being a guest at his house, and from what he said I did not care to purchase and he did not want me to buy the land, and Rafael Ruellas spoke to me about it; he was a friend of mine. I do not recollect any others whose names I now individually remember. The doctor who I referred to owned land in Mesilla. I think it is the land now owned by Tom Bull—I think. I do not remember the doctor's name.

214

Cross-examination:

Q. You say you went to Mesilla in July, 1861; how long did you remain there before you went up the country?

A. I remained in Mesilla from July, 1861, until about February 1, 1862, and came back about March, 1862, to Las Cruces, remaining there a few days, and went back to Texas.

Q. During the time you were in Messilla, from July to February, what was your business?

A. I was adjutant general of the Confederate forces.

Q. Was not the conversation you had with Guadalupe Miranda, Ruellas, and others in reference to the title to the land in the Mesilla valley that the people there then had to their lands, and what title they would give to a purchaser under the grants that had been given by the Mexican government, viz., the Dona Ana Colony Bend grant, the Mesilla Colony grant, the Santo Tomas, and others?

A. Yes; I believe the grants you mention I heard spoken of. I was not afraid to buy the Government vacant land, but I am not positive about those other grants, only the Heath and Mesilla, because it was the Mesilla grant that the land I desired to purchased lay. This land I desired to purchase lay on both the Mesilla and Heath grant-.

Q. May it not be the fact that your impressions as to the Heath grant being mentioned by these people arise from the fact that you had talked with Castro about this Heath grant?

Objected to as asking for a conclusion or impression and not for a fact.

—. My recollection is that it did have something to do with it. It called my attention to the fact of the conversation that I had had with Mr. Castro.

Q. Can you remember so as to state positively that Rafael Ruellas said anything to you about the Heath grant?

215 A. I cannot state positively; just an impression; he went with me to Texas as a friend of mine.

Q. Can you state positively that Guadalupe Miranda stated to you anything about the Heath grant; and, if so, what did he say?

A. I went to him to ask him in relation to the purchase of this land and to the titles to them, because I thought he knew more about it than any other person who lived up there. He was my friend and vis-ted my house, and these are my reasons why I went to him. I told him I wanted to buy two tracts of land that lay over

in Mesilla and wanted to know of him if the title was good; that I was about to trade some land I had in Texas for these lands and wanted to be sure that the titles to these lands in Mesilla were good. His words, as near as I can recollect, are as follows: The Government of the United States had neither issued no titles nor confirmed them; that there was a grant, I think the Mesilla Colony grant, and that there was an old Spanish or Mexican grant—they are synonymous terms with me—that was issued to a Dr. Heath, and he gave me the Spanish name; I do not now recollect; it sounds like Juan Gid; that is my recollection, and this is all I recollect.

Q. Can you state on your recollection positively that there were any other gentlemen with whom you talked who told you of the Heath grant?

A. No; none except Castro and Miranda.

T. T. TEEL.

THE STATE OF TEXAS, }
County of El Paso. }

Sworn to and on oath deposed by the said T. T. Teel and by him subscribed before me this 8th day of June, A. D. 1895, at El Paso, in El Paso county, Texas.

Given under my hand and official seal, at said El Paso,
[SEAL.] Texas, the day, month, and year last above written.

JOHN C. PEARCE,
Notary Public in and for El Paso County, Texas.

My term of office expires June 1st, 1897.

J. C. P.

216 EXHIBIT P FOR PLAINTIFFS.

Whereas by certain articles of agreement made and entered into on the twenty-second day of September, one thousand, eight hundred and eighteen, between Robert A. & John G. Heath by virtue of which said instrument, the — Robert and John were tenants in common in all real personal and mixed estate, held, purchased and owned by them, the said Robert and John. Now the said John for and in consideration of the sum of three thousand dollars, to him in hand paid by the said Robert, the receipt whereof is hereby acknowledged, has this day with Easter his wife, sold, transferred, conveyed, aliened and assigned over all their right title, claim and interest of what nature or description whatever unto the said Robert in and to the following-described property. One certain lot of ground in the town of St. Charles, purchased by the said Robert of James Mackay and Isabella his wife, and by the said John by Emanuel A. Rock and Margaretta Lebeau his wife, which by reference to the recorder's office in the county of Saint Charles, will more fully and at large appear. Also a tract of land containing eight hundred arpens French superficial measure situated on the waters of Salt river, purchased by Jean Baptiest Bravier and granted to him 11 April 1800, by Lieutenant Governor Zeno Trudeau. Also four hundred arpens of land purchased of Francois Noissie and

Cecile his wife and Louis Dubourg and Celesto his wife, situated on the Missouri river on the northwardly shore below the town of Saint Charles and opposite the Charbonnier, which by reference to the recorder's office at Saint Charles will more fully and at large appear. Also a tract of land containing three hundred and twenty acres situate in the county of Saint Charles, purchased of Pierre Dubois and Celesto his wife, John Baptiest Bequet, Calise Montardy and Therese and Mary Ann three wives, heirs of Baptiest Vallie deceased, which by reference to the recorder's office at Saint C-arles, will more fully and at large appear. Also a tract of land purchased of Louis Tajon and Marie Louise his wife situate in the county of Saint Charles at the Marie Croche containing eighty arpens French measure, as by reference to the recorder's office at Saint Charles will more fully and at large appear. Also a certain lot of ground in the town of Saint Charles purchased of
217 Louis Tajon, Marie Louise his wife, situate on the main street. Bounded on the east by Main street, south by a [illegible] in the possession of John and George Collier formerly of Joseph [illegible]ecke, which by reference to the recorder's office at Saint Charles will more fully and at large appear. Also a tract of land purchased of Reni Dodier and Marie Terran his wife, situated on Salt river which was granted to said Daudier by Charles D. Delassus lieutenant governor of upper Louisiana as by reference to the recorder's office at Saint Charles will more fully and at large appear. Also a lot of ground purchased of Peter Bergier situated in the town of Saint Charles containing by estimation fifty feet on the main street and running back to the Missouri as by reference to the recorder's office will more fully and at large appear. Also a tract of land conveyed to John G. Heath containing eight hundred arpens situate in Saint Charles on the waters of Mississippi called Salt river, and four hundred arpens the half of another tract in the same county and on Salt river waters granted to one Joseph Marie by whom the same has been conveyed to the said John G. Heath, all of which before-described premises with all and singular the advantages appurtenances, privileges and benefits thereunto belonging or in anywise appertaining we the undersigned have this day assigned over, transferred, conveyed, released and quitclaimed unto the said Robert his heirs, executors, administrators and assigns forever.

In testimony whereof, we have hereunto set our hands and seals this 17th day of April 1824.

JOHN G. HEATH. [SEAL.]
ESTHER HEATH. [SEAL.]

Witness-:
O. J. REDD.
JOHN F. SIMPSON.

STATE OF MISSOURI, } ss:
County of Montgomery, }

Be it remembered that on this thirtieth day of April, one thousand eight hundred and twenty-four, before me, a judge of the

supreme court of the State of Missouri, personally came John
218 G. Heath and Esther, his wife, and severally acknowledged the foregoing indenture as for their act and deed and the land and premises therein mentioned and bargained and sold to be the right and estate of the said Robert A. Heath, his heirs and assigns forever. She, the said Esther, being by me first made acquainted with the contents thereof and by me privately examined apart from her said husband whether she executed the same voluntarily and without compulsion or under influence of her said husband, acknowledged and declared that she executed the same voluntarily and without compulsion or undue influence of her said husband; which said John and Esther are personally known to me to be the grantors within named.

Taken and certified the day and year aforesaid.

MATHIAS McGIRT.

Recorded this 27th day of July, 1824.

WM. CHRISTY, JR.,
Ex Officio Recorder.

STATE OF MISSOURI, } ss:
County of St. Charles, }

I, Jno. K. McDearmon, clerk of the county court and *ex officio* recorder in and for said county and by virtue of said office custodian of the records of deeds of said county, hereby certify the above and foregoing to be a full, true, and correct copy of a deed from John G. Heath to Robert A. Heath, with the acknowledgment and filing of the same, as remains of record in my office in Book "H," at page 47.

Witness my hand and official seal, at my office, in St. Charles, Mo., this 28th day of November, A. D. 1893.

JNO. K. McDEARMON, *Clerk.*

219 STATE OF MISSOURI, } ss:
County of St. Charles, }

I, Henry F. Piper, presiding judge of the county court within and for said county, the same being a court of record, hereby certify that the signature attached to the above certificate purporting to be that of Jno. K. McDearmon is his genuine signature, and that he was at the time thereof county clerk of the county court and *ex officio* recorder of deeds for said county, and as such full faith and credit are due all his acts, and that the said attestation above made by him is in due form.

In testimony whereof I have hereunto set my hand, at my office, in St. Charles, Mo., this 28th day of November, A. D. 1893.

HENRY F. PEPER.

STATE OF MISSOURI, } ss:
County of St. Charles, }

I, Jno. K. McDearmon, clerk of the county court within and for said county, the same being a court of record, hereby certify that the signature attached to the foregoing certificate purporting to be

that of Henry F. Piper is his genuine signature, and that he was at the time thereof presiding judge of the county court of said county, and as such full faith and credit are due all his official acts, and the said attestation is in due form.

Witness my hand and official seal, at my office, in St. Charles, Mo., this 28th day of November, A. D. 1893.

JNO. K. McDEARMOND.

220 EXHIBIT Q FOR PLAINTIFFS.

Know all men by these presents that we, John G. Heath and Esther his wife of the county of Cooper and State of Missouri for and in consideration of the sum of fifteen hundred dollars to us in hand paid by Robert A. Heath of the county and State aforesaid the receipt whereof *if* hereby — has this day granted bargained and sold and by these presents do grant bargain and sell unto the said Robert A. Heath his heirs and assigns forever the following-described tract of land situated, lying and being in the county of Gasconade and State aforesaid. First the northwest fractional quarter of section number eleven of township number forty-five north in range number six west containing one hundred and fifty-five acres and eighty-seven hundredths. Second the southwest and northeast fractional quarter of section number eleven of township number forty-five in range six west containing one hundred and sixteen acres and ninety-five hundredths, third the southeast fractional quarter of section eleven in township number forty-five of range number six containing fifty-eight acres and one-hundredths. Fourth. The southwest fractional quarter of section number thirty-three in township number forty-six in range number five containing eighty-four acres and twenty-seven hundredths to have and to hold all and singular, the appurtenances, privileges and advantages arising from the above-described premises unto the said Robert, his heirs and assigns forever, and the said John farther covenant*ly* and agrees to and with the sa-d Robert to warrant and defend the title to said premises against the claim of all and every person whatsoever.

In testimony whereof we have -unto set our hands and affixed our seals this *l*seventeenth day of April one thousand eight hundred and twenty-four.

JOHN G. HEATH. [SEAL.]
ESTHER HEATH. [SEAL.]

Signed, sealed, and delivered in present of witness—
O. F. REDD.
JOHN T. SIMPSON.

221 STATE OF MISSOURI, } ss:
County — Gasconade, }

Be it remembered that on this 20 day of April, 1824, before me, one of the judges of the supreme court of the State of Missouri, personally came John G. Heath and Esther, his wife, both of whom are personally known to me, and severally acknowledged the foregoing

instrument as their act and deed, and the land and premises therein mentioned and bargained and sold to the right and estate of Robert A. Heath therein mentioned, his heirs and assigns forever. She, the said Esther, being by me first made acquainted with the contents thereof and by me privately examined apart from her said husband, acknowledged and declared that she executed the same voluntarily and without compulsion or undue influence of her said husband. Taken and certified the day and year aforesaid.

MATHEW McGIRK.

Recorded the 4th day of July, 1825.

DAVID WALDO,
Clerk and ex Officio Recorder.

STATE OF MISSOURI, } ss:
County of Gasconade, }

I, G. H. Homfeldt, circuit clerk and *ex officio* recorder of deeds in and for said county, hereby certify that the above is a true copy of the deed as the same appears of record in Book "A," page 33, in my office.

Witness my hand and seal, at office in Hermann, this 8th day of January, 1894.

[SEAL.] G. H. HOMFELDT, *Recorder.*

STATE OF MISSOURI, }
County of Gasconade. }

222 This is to certify that the foregoing attestation is made and executed in due and proper form and executed by the proper officer; that the foregoing signature of G. H. Humfeldt is genuine, and that the said G. H. Humfeldt is at present the duly elected and acting clerk of the circuit court of Gasconade county, State of Missouri, and *ex officio* recorder of deeds in due form, and full faith and credit is due his official acts.

Witness my hand this 9th day of January in 1894.

RUDOLPH HIRZEL,
Judge of the Circuit Court of Gasconade County, Missouri.

STATE OF MISSOURI, } ss:
County of Gasconade, }

This is to certify that the foregoing signature of the Hon. Rudolph Hirzell, judge of the 13th judicial circuit, which includes Gasconade county, is genuine, and that the said Rudolph Hirzel is at present the duly elected and acting circuit judge of Gasconade county and State of Missouri, and that said attestation is in due form, and full faith and credit is due his office and acts.

Witness my hand and official seal this 10th day of January, 1894.

G. H. HOMFELDT,
Circuit Clerk and ex Officio Recorder.

223 EXHIBIT — FOR PLAINTIFFS.

Bill of Sale.

In the recorder's office, Cooper county, Missouri.

APRIL 6, 1824.

We, Robert and John Heath, have this day bargained and sold unto Joseph Reavis our negro man, William, aged about 28 years, a mulatto, which we purchased from Antonio Roynal for the sum of five hundred dollars, which we have received, and we covenant and warrent and promise that said slave, William, is at all times and in all places a slave for life and free from all encumbrances whatever, the title to which said William we warrent and defend forever, this sixth day of April, one thousand eight hundred and twenty-four.

JOHN G. HEATH. [SEAL.]
R. A. HEATH. [SEAL.]

CHARLES WOOD.
JOHN BIGHAM.

COOPER COUNTY, } ss:
State of Missouri. }

Personally appeared Charles Woods, a subscribing witness to the within bill of sale, and made oath before me, John Briscoe, a justice of the peace for said county, deposeth and saith that Robert A. and John G. Heath acknowledged the within bill of sale to be their act and deed, and further states that he, Charles Woods, was personally and well acquainted with John G. and Robert A. Heath.

JOHN BRISCOE, *J. P., C. C.*

STATE OF MISSOURI, } ss:
County of Cooper, }

I do certify that I recorded the within and foregoing bill of sale or instrument of writing on the 28th day of June, 1824, in Book "B," page 282.

ROB'T P. CLARK, *Cl'k.*

224 STATE OF MISSOURI, } ss:
County of Cooper, }

I, G. T. Pendleton, clerk of the circuit court and *ex officio* recorder in and for said county (the said county being a court of record in and for said county and State), certify that the foregoing is a true copy of a bill of sale from John G. Heath and Robert A. Heath to Joseph Reavis, and also the will of Robert Adams Heath, as fully as the same remain of record in my office.

In witness whereof I have hereunto set my hand and affixed

official seal at my office, in Boonville, Mo., this the 9th day of December, 1893.

G. T. PENDLETON,
Clerk & Recorder.

STATE OF MISSOURI, } ss:
County of Cooper, }

I, Dorsey W. Shackl-ford, judge of the circuit court of the 14th judicial circuit of the State of Missouri (said Cooper county being within said judicial circuit), do certify that G. T. Pendleton, whose signature appears to the foregoing certificate, is and was at the time of signing the same clerk of the circuit court and *ex officio* recorder in and for the said county of Cooper (the said court being a court of record in and for said county and State), and that the said attestation is in due form.

Giv-n under my hand this 9th day of December, 1893.

DORSEY W. SHACKLEFORD,
Judge of the 14th Judicial Circuit of the State of Missouri.

STATE OF MISSOURI, } ss:
County of Cooper, }

I, G. T. Pendleton, clerk of the circuit court in and for the county of Cooper (the same being a court of record in and for said county and State), do certify that Dorsey W. Shackleford is judge of
225 the circuit court of the 14th judicial circuit of the State of Missouri, duly commissioned and qualified.

In witness whereof I have hereunto set my hand and affixed my official seal at my office, in Boonville, Mo., this the 9th day of December, 1893.

G. T. PENDLETON, *Clerk.*

226 EXHIBIT S FOR PLAINTIFFS.

(1.) T. Calderon. February 3rd, 1823. Extract.

MOST EXCELLENT SIR: We address to you the subjoined report, petition, and copy of the passports of the doctor in medicine Don Juan Gid, Anglo-American, who aspires to be a citizen of this Empire and to establish himself at the place of Brasito, and this corporation respectfully requests Your Excellency to be pleased to send these documents up to the throne of His Imperial Majesty and to excuse our errors if it does not go in due order of which we are ignorant. God preserve Your Excellency many years.

Compared. Francisco Sosa (rubric).

Paso del Rio del Norte, December 27th, 1822, second of our independence.

Most excellent sir.

JOSE FRANCISCO DE BARRIO. [RUBRIC.]
JOSE RAFAEL GARCIA. [RUBRIC.]
FRANCISCO JAVIER BERNAL. [RUBRIC.]
JOSE MARIA BELARDE. [RUBRIC.]
JOSE FRANCISCO CARVAJAL. [RUBRIC.]
JUAN MARIA BARDA. [RUBRIC.]
JOSE MARIA CORDOBA. [RUBRIC.]
MARIANO HORCASITAS. [RUBRIC.]
JUAN MARIA PONCE DE LEON. [RUBRIC.]

On the margin: The board has received this expediente today, the 16th of April, 1823 (2). Calderon (rubric).

SIR: The common counci[l] ayuntamiento) of Paso del Rio del Norte, situated at great and [re]mote distances from other towns, has the honor to speak for the fi[rst] time to your Imperial Majesty and to inclose to you with the m[ost] profound respect the original petition and copy of the passports of Doctor Don Juan Gid, Anglo-American, who proposes to establish himself and other Catholic families at the place called Brasito, about twelve leagues distant from this town. This corporation, being as yet little informed in the existing orders in force in the matter and there being no professional educated person in this place nor in the whole province with whom to consult, solely relates to Your Majesty in an humble way the reasons it has for the benefit that seems to it may result from these new inhabitants and settlers. This entire jurisdiction
227 has about eight thousand souls, governed politically and civilly by three common councils (ayuntamientos), the command of lieutenant governor being vested provisionally in the (3) three alcaldes of this town, and in military matters it is governed by the commandant of the neighboring presidio of San Elceario; in ecclesiastical matters by the curate of this town and his assistant and two religious persons who govern the very near and almost contiguous towns of San Lorenzo, Senecu, Ysleta, and Socorro, where the jurisdiction terminates. In all this Territory we, the inhabitants thereof, desire that the arts and industries demanded by the fertility of the soil be established, for up to date it can be said that we have been in need of and are in need of everything, even being ignorant of the names of artisans and without having masters to teach them to us or at least to see them in order to imitate them. It appears to us (save always the high intelligence of Your Majesty, our beneficent father and our liberator) that when the new settlement to which the petitioner refers is established in the vicinity of this place it will redound to the great benefit of these miserable, ignorant, and remote inhabitants. Therefore, as faithful subjects and with the confidence of loving sons (4), they cry out in their necessities and

Compared. Francisco Sosa (rubric).

send up to the higher hands of Your Majesty these documents which we judge necessary, in order that your Imperial Majesty, in use of your condescension and notorious graciousness, may decree and determine what may be convenient, the party in interest awaiting in this town your imperial decision. God preserve the valuable life of Your Majesty a thousand years.

Paso del Rio del Norte, December 27th, 1822, second of our independence.

At the feet of Your Majesty which we kiss.

JOSE FRANCISCO DE BARRIO. [RUBRIC.]
JOSE RAFAEL GARCIA. [RUBRIC.]
FRANCISCO JAVIER BERNAL. [RUBRIC.]
JOSE MARIA BELARDE. [RUBRIC.]
JOSE FRANCISCO CARVAJAL. [RUBRIC.]
JUAN MARIA BARDA. [RUBRIC.]
228 JOSE MARIA CORDOBA. [RUBRIC.]
MARIANO HORCASITAS. [RUBRIC.]
JUAN MARIA PONCE DE LEON. [RUBRIC.]

SAINT CHARLES, 12*th May*, 1822.

Don J. G. Heath, the bearer hereof, who visits the Empire of Mexico with a view of obtaining citizenship, has our official certificate (5) of the 8th inst. I beg leave to state to our brethren of New and old Mexico that Doctor Heath is a gentleman of high standing in this country and much esteemed for his abilities in the learned profession, a sound politician, and man of firm integrity, and is well known to me as such. He is a member of the Catholic Church, zealous, moral, and industrious. That he may be well received and hospitably treated by you is my earnest desire, and may God prosper you.

Compared. Francisco Sosa (rubric).

With respect and esteem.

From your friend, A. McNAIR. [RUBRIC.]

A true copy from the original.

WM. ROSS. [RUBRIC.]

Original retained.

JOHN G. HEATH. [RUBRIC.]

I certify, under the form that is conceded to my office, that Don Juan Gid, a citizen of the United States of America of the North, made the present copy in my presence from the original which he preserves in his possession, and in witness thereof I signed it in Paso, on the 29th of December, 1822, second of the independence of Mexico (6).

JUAN MARIA PONCE DE LEON,
Secretary. [RUBRIC.]

STATE OF MISSOURI, *ss:*

I, Alexander McNair, governor of the State of Missouri, in the United States of North America, do hereby certify to all persons to whom these presents shall come that John G. Heath is a citizen of the said State of Missouri, to me well known as such; that he was a member of the convention for framing the constitution of this State, and that he is at present a member of the house of representatives in the General Assembly of this State from the county of Franklin.

In testimony whereof I have hereunto set my hand and caused the great seal of the State of Missouri to be affixed.

Done at Saint Charles this eighth day of May, A. D. one
229 thousand eight hundred and twenty-two, of the Independence of the United States the forty-sixth and of the State of Missouri the second.

A. McNAIR. [RUBRIC.]

By the governor:

WM. G. PETTUS,
Secretary of State (7).

A true copy from the original.

WM. ROSS, [RUBRIC.]
Anglo-American.

The original papers retained in my possession.

JOHN G. HEATH. [RUBRIC.]

I certify, under the form that is conceded to my office, that Don Juan Gid, a citizen of the United States of America of the North, made the present copy in my presence from the original, which he preserves in his possession, and in witness thereof I signed it, in Paso, on the 22nd of December, 1822, second of the independence of Mexico.

Compared. Francisco Sosa (rubric).

JUAN MARIA PONCE DE LEON, *Secretary.* [RUBRIC.]

STATE OF MISSOURI, }
Franklin County. }

10TH MAY, 1822.

We, the undersigned, citizens of Franklin and Gasconade counties, do hereby certify to all this letter may concern that J. G. Heath, the bearer hereof, is our neighbor, well known to us; that he is a man of honesty, probity, and good demeanor, and highly esteemed by all his acquaintances; wherefore we recommend him

to the attention and hospitality of our brethren in Spanish America, wishing (8) God may prosper you.

MOSES WELTON,
Judge of the County Court, G. C'y, and
JAMES REGANS,
Sheriff, Franklin County.
J. W. HOLLAND, M. D.,
New Port, F. C'ty.
JOHN STANTON,
Judge County Court.
KINKEID CALDWELL,
Judge of County Court, F. C'ty.
P. P. BONLEVARE,
R. P. from Frank. C'ty.
EDWARD SIMON, *Farmer.*
JAMES MILLER, *Farmer.*
ROBERT STROBE, *Farmer.*
DAVID EDWARDS,
Justice of the Peace.
WILLIAM DODDS,
Justice of the Peace.
JOHN NICKO, *Farmer.*
WM. CLARKE, *Farmer.*
DAVID WALDO,
Clerk Gasconade County.
DANIEL WALDO, *Sheriff do.*
J. J. WRIGHT, *Merchant.*
J. WOOLLUMS,
Col. 13th Regiment Militia, Miss.
JESSE McDANIEL,
Corporal 15th Regiment do.
CLAYTON HINTON,
Lt. Col. do.
WM. GOWENS,
Clerk Franklin County.

I certify, under the form that is conceded to my office, that
230 Don Juan Gid, a citizen of the United States of America of the North, made the present copy in my presence from the original, which he preserves in his possession (9), and in witness thereof I signed it, in Paso, on the 29th of December, 1822, second of the independence of Mexico.

JUAN MARIA PONCE DE LEON, *Secretary.* [RUBRIC.]

STATE OF MISSOURI, }
2nd Judicial Circuit, } *ss:*

I am particularly acquainted with J. G. Heath and with most of those citizens subscribing this paper. I know him to be the person therein recommended and the subscribers to be the persons there represented and cordially

Compared. Francisco Sosa (rubric).

join them in recommending said Heath to the attention and hospitality of our brethren in the provinces of Mexico.

RUFUS PETTIBONE,
Judge of the 2nd Judicial Circuit in Missouri.

The within a true copy from the original.

WM. ROSS. [RUBRIC.]

Original retained.

JUAN G. HEATH. [RUBRIC.]

Power.—And in witness thereof I signed it, in Paso, on the 29th of December, 1822, second of the Independence of Mexico (10).

JUAN MARIA PONCE DE LEON, *Secretary.* [RUBRIC.]

Most illustrious common council:

Doctor Don Juan G. Heath, a citizen of the United States of *the* North *of* America, ex-member of the convention that framed the constitution of the State of Missouri and one of those elected to the house of representatives of the State from the district of Franklin, by the most lawful petition that is most proper in law, appears before your honorable body and states that, having arrived in this Empire for the purpose of establishing himself in the province that suits him and temperament, I have found by inquiry in this town the point called El Brasito, up the river from the same ten or twelve leagues distant from this jurisdiction, a place which, although there have been persons who have proposed to settle it in the past ten years, have not accomplished it, nor have they made it pro-
231 duce the advantages which it shows by its fertility (11), all with benefit to this jurisdiction. In this supposition, desirous of uniting myself with my brethren, the faithful inhabitants of this Empire, I proceed to state at once to your honorable body by means of this my sound ideas in the following form: I will bring my family and interests, as well as twenty-five or thirty other families of Christian Catholics, composed of honorable citizens, of good reputation as artisans by profession, for making cloths, cotton domestics, blacksmiths, silversmiths, farmers, and others, all armed in such manner that they can defend themselves without troops and serve as a wall against the Apache Indians, who contiually damage this town. I do not doubt that the graciousness and prudence of your honorable body, because interested in the prosperity and happiness of this section and in observance of the wise and merciful laws (12) of the Empire, will weigh at their true value the many advantages which will result to this town from my propositions, which I will carry out, provided said land is granted to me, for it is not unknown to your honorable body that in all this jurisdiction there is not an individual of profession in his trade, and also that they can never follow them with propriety without having some one from whom to learn them. In view, then, of what I have stated, I pray your honorable body to be pleased to forward this my petition, supported by your report if I should be

Compared. Francisco Sosa (rubric).

worthy of deserving it, to the hands of the imperial government, in order that His Majesty, with his notorious and gracious zeal, may give us the consolation we expect as a remedy for our ills, your honorable body taking into consideration that for the locations of houses, establishments of machinery, subsistence of families for farms (13) I indispensably need two leagues in extent on both sides down the river from said point of Brasito, for I will have the benefit of the timbers and pastures in the same manner as
232 the other inhabitants of this jurisdiction. Therefore I pray you to be pleased to do, in use of the authority you exercise, as I petition in this my application, excusing me for having failed to prepare it on paper of the corresponding seal, as there is none in this town. I protest it is not in bad faith, and what is necessary, etc.

Compared. Francisco Sosa (rubric).

Town of Paso, December 28th, 1822.

JUAN G. HEATH. [RUBRIC.]

I certify that it is a copy taken from its original existing in this department.

Mexico, July 25th, 1894.

GILBERTO CRESPO Y MARTINEZ, [RUBRIC.]
Chief Officer.

CONSULATE OF THE UNITED STATES OF AMERICA,
CITY OF MEXICO.

I, Thos. T. Crittenden, consul general of the United States of America at the city of Mexico, federal district, Republic of Mexico, and resident thereof, do hereby certify that I am personally acquainted with the signature of Gilberto Crespo y Martinez, and that the signature on this paper hereto annexed is his true and genuine signature. Said attestation is in due form and is entitled to full faith and credit for the uses and purposes therein expressed.

Witness my hand and official seal of this consulate general this 28 day of July, A. D. 1894, and that said Gilberto Crespo y
[SEAL.] Martinez is the proper custodian of said department de Fomento.

THOS. T. CRITTENDEN,
Consul General.

233 I hereby certify that the foregoing is a correct translation of the original document in the Spanish language, of which it purports to be a translation, except that part on page 3 beginning "Saint Charles" and ending with "John G. Heath, rubric;" that part beginning "State of Missouri" and ending on page 4 with "John G. Heath, rubric;" that part on page 4 beginning "State of Missouri" and ending with "Franklin county," and that part on page 5 beginning "State of Missouri" and ending "Juan G. Heath, rubric," and the certificate of the consul general of the United States in the city of Mexico, all of which exceptions appear in the aforesaid

document, written in the English language, and excepting also the figures in parenthesis, which indicate the paging of the original.

HENRY O. FLIPPER,
Special Agent, Dep't of Justice, U. S. Court of Private Land Claims.

234 EXHIBIT — FOR PLAINTIFFS.

Letters of Guardianship.

STATE OF ILLINOIS, } ss:
Knox County, }

In the County Court, January Term, A. D. 1893.

The People of the State of Illinois to James Scott, of said county, Greeting:

Whereas at the November term of the county court of said county, A. D. 1892, holden at Galesburg, you were, by order of said court duly entered of record on the 1st day of December, 1892, duly appointed guardian for L. Ethel Scott, Lucretia Scott, and Mabel Scott:

Trusting in your fidelity, therefore the said court does by these presents constitute and appoint you to be guardian unto said minors and authorize and empower you to take and have the care of their person and the custody and management of their property, frugally and without waste or destruction to improve and account for the same in all things according to law.

Witness M. O. Williamson, clerk of the said county court, and the probate seal of said court, hereunto affixed, at Galesburg, this 11th day of January, in the year of our Lord one thousand eight hundred ninety-three.

[SEAL.] M. O. WILLIAMSON,
Clerk of the County Court,
By FRANK L. ADAMS, *Deputy.*

I, M. O. Williamson, clerk of said county court, do certify that the foregoing are true and full copies of the original letters in my office remaining.

Given under my hand and seal of the said court this 24th day of January, A. D. 1893.

[SEAL.] M. O. WILLIAMSON, *Clerk,*
By ZETTIE MEAD, *Deputy.*

235 EXHIBIT U FOR PLAINTIFFS.

Know all men by these presents that we, Robert W. Sherman and Alemedia Sherman, his wife, of Kennett, Dunklin county, Mo., in consideration of the premises hereinafter stated, do hereby sell, transfer, and convey to J. B. Cessna, of Hastings, Nebraska, $\frac{1}{16}$, one-sixteenth, of all our right, title, and interest in the following piece or parcel of land, situated in Donna Ana county, New Mexico, known

as the Bracito tract, granted to Juan Gid, Dr. John G. Heath, by the Mexican government April 17, 1823, reported by the surveyor general as claim No. 505 of Mexican and Spanish land grants and in the archives No. 410, for the purpose of paying costs and expenses in the prosecution of our said claim in the land aforesaid, and we further sell and convey to the said J. B. Cessna the one-half of our right, title, interest, and claim in said tract of land aforesaid as fees in the prosecution of our said claim in the land aforesaid; the said J. B. Cessna to have the right to sell and convey the said $\frac{1}{16}$ part of our interest to any party or party who will raise the costs and expenses of said suit, but not to make us personally liable for said cause and expenses farther than the said one-sixteenth interest.

We hereby revoke any power of attorney or deed heretofore given to Mansfield and Palmer or to any one else relative to this land.

The said J. B. Cessna hereby promises to perform faithfully, earnestly, and diligently his employment in the prosecution of this claim.

Witness our hands and seals this 6th day of October, A. D. 1892.

ROBERT W. SHERMAN.
her
ALMEDIA C. SHERMAN.
mark.

Signed, sealed, and delivered in the presence of—
CHARLES J. BARHAM.
J. B. HARTMON.

STATE OF MISSOURI. } ss:
County of Dunklin, }

Personally appeared before me, Charles J. Barham, a notary public within and for said county and State, Robert W. Sherman and Almedia C. Sherman, his wife, whom I know to be the identical person who signed the foregoing deed in the statement of writing, and acknowledged the same to be their free act and deed to the
236 end that the same might be recorded as such; and the said Almedia C. Sherman, being examined separate and apart, said she voluntarily acknowledged said instrument to be her act and deed without any compulsion or coercion from her husband.

Witness my hand and notarial — this 6th day of October, A. D. 1892.

[SEAL.] CHAS. J. BARHAM, [SEAL.]
Notary Public.

My term expires 6, 10, '93.

237 EXHIBIT W FOR PLAINTIFFS.

Extract of Proceedings of Departmental Assembly.

Next were read a letter from the ayuntamiento of El Paso and the accompanying report which it made to the president in regard to land which it had given to the Anglo-American, Juan Gid,

at his request, and another petition made to the same body by Senor de Albo asking for pasture land for a herd of cattle, sheep, and horses, it being reduced to two sitios of a square league each, and the details of both petitions having been taking into consideration, after a full discussion it was decided that as to the grant of land made to the American the ayuntamiento of El Paso should be reprimanded for the reason that that body had acted hastily and with little wisdom in giving away land that belonged to the people of that town, to the great injury of all its inhabitants, and, besides, the law of colonization being at that time repealed, and the said ayuntamiento, to avoid making itself responsible for damages which the stranger would claim if the families come to settle in this country which he has offered to bring, should notify the aforesaid Gid through the medium of the representative of the United States that the possession which was given him at the Bracito was given by reason of a doubtful interpretation and wrong understanding about the law of colonization already repealed, and that those lands belonged to the jurisdiction of El Paso.

JOSE ANTONIO VISCARRA, *President.*

Juan Bautista Vigil, departmental secretary:

I hereby certify that the foregoing, on four pages, have been carefully compared and is a true copy of a portion of the proceedings of the provincial deputacion of New Mexico for the 17 of June, 1823, now on file in my office and of the official translation of the same. Done in Santa Fé this 5th day of January.

E. T. HOBART,
Surveyor General.

238 DEFENDANTS' EXHIBIT 2.

Letter Transmitting Petition and Proceedings to Governor.

Mr. GOVERNOR: In consequence of the resolution, made by this corporation on the 3rd of April of this year, upon the petition of Don Juan Gid, an Anglo-American, I forward to Your Excellency a copy of the minute and application, together with the subsequent proceedings up to the full execution of article 4 of the decree of January 3rd of this year relating to colonization, but as the full execution of this law is new in these countries, it has occasioned in two particulars the protest made by Don Agapito Albo, deputy of the province and a lawyer in this town, which I also enclose for the superior information of Your Excellency.

Immediately thereafter, under date of April 17th there were presented to this corporation two petitions of residents of this town praying that to them also and by reason of preference there be granted to each one at least an hacienda up the river on this side of the Bracito. The imitative circumstances of the new settlers and the fact that this corporation has no municipal ordinances regulating the distribution of land that may be useful and beneficial in promoting settlement, agriculture, arts, etc., place this corporation under the necessity of making known to your superiority the

resolution, that Your Excellency may be pleased to dictate whatever may be your pleasure in the matter, whether it be by yourself or after consulting the most excellent provincial deputation.

Session of today, 24th of April, 1823.—This place having granted it by the most excellent provincial deputation that territory — extends up the river as far as San Diego, distant 40 leagues, resolved as a benefit to this public bring before the government the following articles for its approval, if it should find it convenient.

1st. That inasmuch as up the river there are only the woods, these and the pastures shall always be common both to the families of the colonists that have been admitted in aggregation and to those of this jurisdiction.

2nd. That the farming lands on both sides of the river be not wasted by giving the property therein to stock-raisers, and that those who apply for them be obligated in the terms of the law to cultivate them, to which end it is proper to caution the public that, in asking and granting these lands, order and proportion be observed, for which a superior regulation is especially desired.

3rd. That an effort be made to keep the 30 families of colonists in the center that all those of this jurisdiction may have the advantage of the model of their industries, arts and instruction which they promise, and in addition to this, and that the intake of water and acequias they shall construct above be used by all those below them who desire to imitate their industries and farms, it being understood that this corporation considers as sufficient without admitting others, the master artisans who are to settle at Bracito, to encourage the imitation of the industry and arts if all the old residents of the jurisdiction who desire and can cultivate the farming lands there on both sides from here to San Diego and by which there will be obtained the happiness of all, and besides this a great restraint of the Apaches in their transit from this settlement to the interior of the province.

4th. That at 4 or 5 leagues distance in circumference of this town property in lands be given to nobody to the extent offered by the decree of colonization, the timber and pasture up the river being always reserved, and in the matter of water there should always be municipal regulations for its distribution and good order, and it will be convenient for these old inhabitants of the jurisdiction to acquire property in the farming between here and San Diego,
239 leaving as we have said, in the middle those who are to be the instructors in our agriculture and industry.

5th. In order to avoid jealousies among private individuals and interests of some breeders of stock who generally are prejudicial to these in the development of agriculture, and arts, it is observed that this jurisdiction is just beginning, and at the same time gets poorer and poorer if it is not given or provided with industries and arts, and in order to have them in its territory a means therefor is that adopted by virtue of article 4, inasmuch as to reject it, difficulties would hereafter arise both because of the scarcity in the national exchequer and the poverty of these residents, for whom this ayuntamiento, to which it very closely belongs to look out for their hap-

piness, has without delay, put in operation the franchise of the law; this corporation stating, nevertheless, that if it has erred in anything, the concession has been made subject to the superior determination. Besides this, it had in mind the fact that the new settler came with a recommendation in his passport from the assembly of the United States, the Government of which was the first that recognized our glorious independence and has admitted in its court the ambassadors of the Empire, recognizing them with every formality.

This ayuntamiento has found it convenient and worthy of public confidence to bring all of the foregoing before Your Excellency and the most excellent provincial deputation, that you may, in view thereof, order what may be just and convenient to remove uncertainties and to proceed with certainty in every matter, which is what is desired.

God preserve Your Excellency many years.

Paso.

JOSÉ YGNO. RASCON.
JUAN MARIA PONCE DE LEON, *Secretary.*

240 DEFENDANTS' EXHIBIT 4.

Disapproval by Departmental Assembly.

OFFICE OF THE SECRETARY OF THE PROVINCIAL DEPUTATION OF NEW MEXICO.

In the session of the 17th of the present month the acting governor of this province, Captain José Antonio Vizcarra, presented to this deputation the reports which your honorable body makes to him in an undated official communication which said chief received; and he also presented another official letter dated the 26th of last April, accompanied by a copy of the proceedings had by your honorable body in giving to the foreigner Mr. John Heath at the Bracito, possession of land belonging to the people of that jurisdiction.

The deputation in the same session resolved to express to your honorable body the surprise it felt at the violent and mistaken procedure with which you conducted yourselves in giving land to foreigners not only with prejudice to the inhabitants of that jurisdiction but also in violation of the same law of which your honorable body availed itself in order to carry into effect the possession referred to, thus opening the door to the continual complaints of its people: this deputation refraining from making other observations to your honorable body, on account of the colonization law which was the moving cause in the concession of the Bracito land to the said Heath having been repealed; but proceeding to direct your honorable body that in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families that he offers to bring, it should notify the said Heath through the plenipotentiary of the United

States resident in New Mexico, or in some other manner which it may deem more prompt and effective, that the possession which has been given to him at the Bracito, belonging to that jurisdiction of El Paso, was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed.

And I communicate it to you by direction of the said deputation, with the understanding that I shall communicate to you the decision that may be arrived at when the petition of Mr. Albo and the other persons of that town shall have been discussed, your honorable body notifying me of the receipt of and compliance with these instructions.

God preserve your honorable body many years.

Santa Fé, June 19, 1823—The third year of independence and the second of liberty.

FRANCISCO JAVIER CHAVEZ. [SCROLL.]

JUAN BAUTISTA VIGIL, [SCROLL.]
Deputy Secretary.

241 DEFENDANTS' EXHIBIT 5*a*.

Article 4.

Original Spanish.

Art. 4. Las familias que por si mismas vengan á establecerse, se presentarán inmediatamente al respectivo ayuntamiento del lugar en que quieran radicarse, para que conforme á las órdenes con que se hallen del Gobierno se les designe por aquel cuerpo el terreno que les corresponda segun la industria que van á plantear.

241*a* DEFENDANTS' EXHIBIT No. 6.

Mr. Tipton's Translation.

Art. 4. The families who come of themselves to settle shall present themselves immediately to the respective ayuntamiento of the place at which they desire to establish themselves in order that, in conformity with the orders which they have from the executive, there be designated to them by that body the land to which they are entitled according to the industry which they are going to undertake.

241*b* DEFENDANTS' EXHIBIT No. 7.

Decree of April 8th, 1823.

The sovereign constituent congress of Mexico, in the session of yesterday, decreed the following:

1. That the coronation of Agustin de Iturbide being an act of violence and of force, and void in law, there is no occasion to discuss the abdication he makes of the crown.

2. Consequently, it also declares as void the hereditary succession

and the titles that have emanated from the coronation; and that all the acts of the late government, from the 19th of May to the 29th of March last, are illegal, but subject to revision by the present congress for their confirmation or revocation.

242 DEFENDANTS' EXHIBIT No. 8.

Decree of April 11th, 1823.

In this (order) the government is instructed, if it does not find it inexpedient, to accede to the application of Stephen Austin to confirm his concession to establish 300 families in Texas; to act upon other applications of like nature, and to suspend until a new resolution the colonization law enacted by the instituent council (junta).

243 DEFENDANTS' EXHIBIT No. 9.

Documents Relative to Heath Grant.

Petition.

Dr. Don Juan Gid, citizen of the United States of North America, in the best legal form allowed by law, appears before your honorable body and states: That, not having received up to date any answer to the communication of December last of last year, which I presented to the former ayuntamiento, the predecessor of your honorable body, which (communication), approved in all its parts, was forwarded to His Imperial Majesty by the same, for which reason and because of the increase (ampleacion) of the power which is given to your honorable body by the law of colonization which was issued by the national instituent assembly (junta) of the Empire on the 3rd of January of the present year: For these reasons I again have recourse through this, repeating my request to your honorable body, adding that I offer to bring for the settlement of the land of El Bracito, which I ask may be given to me, thirty families of Christian Catholics, and among them blacksmiths, gunsmiths, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors of medicine, and to establish a hospital with its corresponding drug store and proper stock therein, with the necessary instruments for all operations: also to build a warehouse supplied with all kinds of merchandise for wholesale: the necessary machines for the manufacture of cotton and cloth goods, another for the manufacture of gunpowder, offering, until payment of the expense of transportation, to furnish the amount of this article all this jurisdiction may need at the very low price of one dollar per pound; it being first class for the use of arms: with the understanding that in all the said trades there shall be admitted for instruction the youths whose parents may see fit to dedicate them thereto; the children of this country (suelo) having the preference thereto.

244 In view of what has been said and because, for establishing the said machinery, utilizing the farms, grazing stock

and for the other field interests, it is indispensable that it have the extension which is necessary therefor, it behooves me to demonstrate to your honorable body that the land which may be assigned to me, limiting me to the smallest amount, be at least enough for (sea lo menos para) an hacienda, and that said designation be made for me on both sides, that is to say, that it be on both sides of El Bracito, because the said land being broken it is necessary to leave out various portions of it. I also propose to your honorable body that until time permits whatever else may be desirable this settlement be attached to the parish of this jurisdiction: likewise that the pasture and woodlands be common, with the same privilege as other people of this locality: recommending that it be without prejudice to those farms (sementeras), and that the petitioner be the person to whom is entrusted the distribution of said lands, he being considered the legitimate justice of said families.

Candor of mind being what I most appreciate, and to join myself with my brethren, the faithful inhabitants of this Empire, living always in the simple peace, in order to dispel all rumors of hatred, I ask your honors that, you being pleased, and in order that the said law of colonization be executed in all its parts, notice of this, my petition, be given to the individuals of this jurisdiction, in order that all these gentlemen who like may better or equal it with a view to the right of preference, in which act your honorable body, to whom is entrusted the power of father of this country (patria) will weigh at their true value, the incalculable benefits that result from my petition whereupon, far from seeking means to deprive it thereof, it would be encouraged in every way to procure their increase.

Wherefore, I ask and petition your honorable body to be pleased to accede to what I petition, being pleased to pardon the fault that this my petition is not upon paper of the proper seal, for there is none in this place, I being ready to pay the fees that belong
245 to the national treasury. I protest that I do not act in bad faith, and the necessary, etc.

Paso, April 7th, 1823.

JUAN GID.

Proceedings of Ayuntamiento.

COUNCIL HALLS OF EL PASO, *April 3rd of* 1823.

The petition of Don Juan Gid being presented it was admitted by the illustrious corporation under the terms which it agreed upon in the minutes of this day, which when seen by the said Don Juan, he accepted, and therefore, on Sunday, the 13th instant, the said petition and the minutes will be made public in the manner customary in this place for the purpose they specify. Don José Ygnacio Rascon and Don José Morales, constitutional alcaldes, executors of the resolutions of their honorable body, thus decreed and signed before me, the secretary of the corporation, to which I certify.

JOSÉ YGNACIO RASCON.

JOSÉ MORALES.

JUAN MARIA PONCE DE LEON, *Secretary.*

At the town of El Paso del Norte on the 13th day of the month of April, 1823, having assembled in these consistorial halls those of the illustrious ayuntamiento, and a large number of the residents who were previously summoned in the customary manner, the petition of Juan Gid and the minutes of the resolution were read, of which the people once being cognizant and being asked by the first alcalde as to whether they were pleased with the new neighbors who contemplated joining this jurisdiction, they answered with many voices in the affirmative showing pleasure and no opposition. Wherefore, immediately it was determined that, on the 16th day of the present month, in consequence of the resolution the señor alcalde of second election, the public attorney (sindico personero) Don
246 Lorenzo Provencio, and the secretary of the corporation, shall go with the petitioner to the place of El Bracito for the purpose of making the surveys and to execute (practicar) what had been resolved by their honorable body, by virtue of the sovereign decree of the 3rd of January relative to the colonization system. And by this action the two alcaldes so determined and signed it before me, the public secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.
JUAN MARIA PONCE DE LEON, *Secretary.*

COUNCIL HALLS OF EL PASO, *April 15th*, 1823.

Don Agapito Albo, deputy to the most excellent corporation of this province, who resides in this town, presented himself in the character of attorney for this corporation and said: that on account of his duties, and being commissioned by the district, he represented that this ayuntamiento having resolved to make a grant to the families whom Don Juan Gid proposes to settle in El Bracito, it appeared to him that with the farms and machinery offered by the new settlers in a few years they might be prejudicial to the old inhabitants in all this jurisdiction, for the reason that when the waters would be turned off above and consumed in those farms they would not reach those other ones in the volume desired. Which suggestion being noticed by the members of this body they proceeded to discuss it, and it was determined by all the votes unanimously that the petitioner Don Juan Gid be called, who being present, said that if the case would happen when there would be scarcity of water in this copious river he and his families were of the understanding that they had to govern themselves by the wise and prudent laws of the Kingdom and the regulations of the ayuntamientos to whom by these it belongs to see that the waters are well distributed. In view of this, and because the said Don Juan again referred to the subjection to the laws and ordinances of the Empire, it was
247 resolved to continue the execution of the decree of the 13th instant, which (decree) was given in consequence of the first order of this honorable body: and by this order they thus determined and ordered it executed, the gentlemen composing this illus-

trious corporation signing it before me the secretary of the corporation, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.
JOSÉ MARIA BELARDE.
JOSÉ FRANCISCO CARBAJAL.
JUAN MARIA BARELA.
ANTONIO PRUDENCIO.

JOSÉ MARIA GARCÍA.
SATURNINO AGUIAR.

JOSÉ MANUEL GARCÍA.
JUAN JOSÉ GIL.
LORENZO PROVÉNCIO.
JOSÉ ALBARES.
JUAN MARIA PONCE DE LEON, *Secretary.*

COUNCIL HALLS OF EL PASO, *April 13th*, 1823.

The action taken in order to proceed to the execution of the survey and to the possession of the land of El Bracito, which is to be given to Don Juan Gid, being concluded, let the expediente in the condition in which it is found be delivered to the commission composed of Don José Morales, second alcalde, the alderman Don José Maria Belarde, the public attorney, Don Lorenzo Provencio, and the secretary of the corporation Don Juan Maria Ponce de Leon, in order that when their commission to conclude, according to the foregoing writ, they may return it to this corporation to proceed to the other matters that may follow. And by the present decree the illustrious ayuntamiento thus resolved, the president thereof signing it before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JUAN MARIA PONCE DE LEON, *Secretary.*

248 PLACE OF EL BRACITO, *April 17th*, 1823.

Having accepted the commission, it appears from the proceedings, was made of four individuals by the illustrious ayuntamiento in order to carry into effect the proceedings had in this expediente, we came to this place, where, in accordance with what is commanded, designating as the central point of the "hacienda" of which Don Juan Gid is going to take possession, the mouth of the ditch of El Bracito (boca acequia del Bracito), he in evidence thereof, cut off with an axe the bark of two cottonwood trees, where, the wood being left bare, he put: Hacienda of Don Juan Gid, and the year of the date upon both; and then, the commission and the party in interest, Don Juan Gid, being present, they appointed for measurers (chainmen) Don Francisco Lucero and Don José Roybal, who offered to comply faithfully with the duties of their charge. That, in order to commence it, there was given to them and they received

an iron chain in good condition which being measured with all care had eleven varas of three geometrical feet, as is provided by the colonization plan in article —. Immediately the first measurement was made about one o'clock in the afternoon over the north course (having known this point with all exactness because the operation was directed by an Anglo-American mathematician, who with the compass (abujon) observed the courses) the same terminating at four o'clock the same afternoon at the summit of a hill for the sake of straightness, where a cross-monument was placed, and at the foot of it Don Juan Gid buried a stone inscribed with his name and the date, which he recognized as his lawful boundary, and complete measurements of two leagues and a half of five thousand varas each. And returning to the east (course) about three o'clock in the afternoon the measurement was made with the needle to the course (al viento), for there was no known water upon that land that may make it desirable for settlement or for "hacienda:" and it was deemed to have the two and a half leagues upon a mount (cerro) called La Cueva, in the Organ mountains; and taking the measurement about half past four o'clock in the after-
249 noon at the cross-monument on the west, this proceeded until sunset, crossing in this interval the road that goes to the Rio de las Salinas, and going down a ridge (ceja) one league and three "cordeles" of one hundred and ten varas was completed. And at sunrise the survey was again resumed until completing the two leagues and a half, which was on a hill belonging to the Mount Roblecito (Cerro de Roblecito) between another black mount (cerro proeto) which is to the left, and a red one to the right, where the same formality as in the other monuments the corner was fixed at that point. And about twelve o'clock of day the commission, the party in interest, and the measurers (medidores) returned to the central point of said "hacienda," from where at about three o'clock in the afternoon the first measurement on the south course was made and it was proceeded with until sunset, when one league and three cordels of one hundred and ten varas were completed. At sunrise the measurement was continued until completing the two leagues and a half, which was in a glen (cañada) that runs up from the river towards the plain below La Mesilla and opposite the Ochoa bluffs where the cross-monument was placed with the same formalities as the others; and the line from this to the south and west being taken with the needle only, the measure is given to where the two and a half leagues may terminate, for the reasons stated in that taken on the east course and terminated at the Cueba de los Organos, this one ending at half past nine o'clock in the day. And taking the direction to the east about ten o'clock of the same day, it measured nineteen cordels, of one hundred and ten varas, as far as the road that goes to El Cobre, and as far as the river fifty-one (cincuenta y una) where for the reason that it was the hour of midday the said measurement was suspended: and that being passed, it was resumed at about two o'clock in the afternoon until completing the two and a half leagues which terminated upon a hill that lies to the right of the Trujillo marshes, a little beyond these, and oppo-

site the last mount of the El Paso mountains, which is called the Paso of the Alamitos, and in the direction of the Crucitas watering place, where with the customary formalities
250 the corner monument was placed about three o'clock in the afternoon with which the measurements with the said vara of three geometrical feet were concluded; at which proceeding the alcalde commissioner in legal form asked the measurers if they acted with the lawfulness they had promised the time of making the first measurement of the "hacienda," which they had concluded: to which they answered that so they had done, and that they entertain no doubt or responsibility, that they have done it as they had promised. Then the party in interest, Don Juan Gid, was asked by the commission if he was satisfied with the survey concluded in that "hacienda," into the lawful possession of which he was to enter according to the colonization laws; to which he replied, that, having been present at the formality with which the survey of his land had been proceeded with, he was satisfied in all its parts. That being the case, and there being no claim made to suspend the course of these proceedings, the present commission place Don Juan Gid in lawful possession of said "hacienda," stating to him that the farm lands which he has in it are the greater part of the bottom lands of the river; that he must not use these for any other purpose except for planting all kinds of edible grains and to supply his trades with the necessaries for agriculture in every matter. That for the raising of live stock of all kinds and horses, what is given to him outside of the said bottom lands of the river is considered sufficient. Charging him also that whatever waters he may take out to run the machines which he proposes to erect, and the others that may occur to them, he must conduct them until they return to their center, so that this town and the adjoining ones of which it is the head may not in any of its parts be made to suffer. Intimating to him lastly that, that for which the four individuals present were commissioned, they concluded with this act, in which what has been done until now was signed by the alcalde Don José Morales, Alderman Don José Maria Belarde, Public Attorney Don Lorenzo Provencio, the interested party Dr. Juan Gid, the measurer Don Francisco Lucero, his companion José Roybal
251 not doing so because he does not know how to sign, but he stamped with his own hand a sign of the cross, before me the secretary of the corporation, to which I certify.

JOSÉ MORALES.
JOSÉ MARIA BELARDE.
LORENZO PROVENCIO.
FRANCISCO LUCERO.
JOSÉ ROYBAL.
JUAN MARIA PONCE DE LEON, *Secretary.*

Having concluded the commission that the illustrious ayuntamiento entrusted to us relative to matters stated in the present expediente, let this be returned to the said corporation in order that

that honorable body may do as indicated in the order of the 13th instant; and by this present provision the four commissioners thus determined today, the 21st of April, 1823, before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ ——RENZO PROVENCIO.
JUAN MARIA PONCE DE LEON, *Secretary.*

COUNCIL HALLS OF EL PASO,
April 22nd, 1823—third of our independence.

This ayuntamiento having on this day received that which by its order was to be executed by the commission appointed from its midst to do the surveying that was to be done in the land of El Bracito, this being five leagues in each direction, the whole of it composing an "hacienda," according to article 5th of the colonization plan; which land was granted by this ayuntamiento to Don Juan Gid for the purpose of settlement as stated afterwards, and he being satisfied with what was done in all its parts by the said commission, it was entered as a minute in due witness thereof the
252 president and other members of which that is composed signing it before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.
JOSÉ MARIA BELARDE.
JOSÉ FRANCISCO CARBAJAL.
JUAN MARIA BARELA.
ANTONIO PRUDENCIO.
JOSÉ MARIA GARCÍA.
SATURNINO AGUIAR.
JOSÉ MANUEL GARCÍA.
LORENZO PROVENCIO.
JOSÉ ALBARES.
JUAN MARIA PONCE DE LEON, *Secretary.*

Yesterday the corporation being in session, I offered to that honorable body various suggestions that it would be prejudicial to this community and the neighboring ones if the giving of property for hacienda to the petitioner, Don Juan Gid, was carried into effect in the lands known as the El Bracito: stating in detail the causes occasioning the harm, to which I was answered that the matter would be discussed by your honorable body, and that its decision would be made known to me by showing me the proceedings had for that purpose. But that has not been done. From the statement that I enclose it appears that today possession is to be given to the said Gid, ignoring the form of what has been newly resolved by your honorable body. Among the many things that I suggested one was that it appeared to me unwise that this matter should be

acted upon at once, and that it should be duly considered for greater certainty. Doubtlessly your honorable body has not borne in mind that whatever property the ayuntamientos give to the citizens of the Empire, it is necessary under the law to publish thirty proclamations on as many days, to await the claim that may allege a better right: why not so in this case which I find to be of greater necessity. This omission, in my opinion, makes me apprehend that your honorable body hurries with gigantic strides perhaps
253 to have that annulled which you are going to transact, and for which you will be responsible to the claims of public law, as it is enunciated in the said statement, which for the reason that it is made a part of the proceedings, to make a demand holding me and your honorable body responsible, it is indispensable for me to take this step to relieve myself of it; and in that case your honorable body will be responsible and not I, attaching this and that which I enclose to the proceedings transacted.

God preserve your honorable body many years.

Paso, April 16th, 1823.

AGAPITO ALBO.

Señor president and members of this illustrious ayuntamiento.

(*Justice's Order.*)

COUNCIL HALLS OF EL PASO, *April 17th*, 1823.

As prayed by the party let it be answered and added to the expediente.

RASCON.

(*Petition Presented to Don Agustin Albo by Two Citizens.*)

Señor Provincial Deputy Don Agapito Albo:

Don Francisco Montes, alternate deputy, and Don Antonio Orcasitas, both residents and citizens of this town, state to Your Excellency in the best form, that it having come to our notice that tomorrow the 16th of the present month, members of the corporation of the ayuntamiento of this said town go to give possession to Don Juan Gid, Anglo-American, of the territory of El Bracito on which is to be designated to him the ground for an "hacienda," which must consist as he states in the same, of five leagues square, and to give him the absolute ownership (propiedad) thereof on the conditions (proposiciones) that he states in the same to the said illustrious ayuntamiento, and it appearing to us that it must be burdensome to the inhabitants of this town and the neighboring ones, for the reasons which, if it be necessary, we will go and demonstrate,
254 we bring it to the notice of Your Excellency in order that you may be pleased to make it known to the said ayuntamiento, stating at the time what you may deem proper in the matter. And if Your Excellency considers it worth while, make it appear to the said corporation to be pleased to lend attention to the sug-

gestions that occur to us. It being an indispensable circumstance, in our opinion, in order to avert a damage of so great proportions, and in case of its not acceding to this our humble supplication, it is necessary for us to hold Your Excellency or the illustrious ayuntamiento which proceeds in the matter responsible according as there is motive therefor under the laws; being pleased to receive this our solicitation upon common paper, as none of any seal can be found. We swear not to be in bad faith, and in the necessary and so forth.

Paso, April 15th, 1823.

FRANCISCO MONTES.
SANTOS ORCASITAS.

(*Justice's Order.*)

This suggestion is of no value because it is contradicted by the writing of Don Santos Orcasitas, presented to the first alcalde on the 19th of April, which is attached to the expediente, and only Don Francisco Montes remains pending (pendiente).

JOSÉ YGNACIO RASCON.

(*Communication in Reply to Don Agapito Albo.*)

COUNCIL HALLS OF EL PASO OF THE RIO DEL NORTE,
April 17th, 1823—third.

On this day a paper was opened which the señor deputy of this province, residing in this town by permission, Don Agapito Albo, sent yesterday the 16th of the same to this illustrious ayuntamiento, in which were found a communication containing a statement made to said gentleman by the private citizens, Don Fran-
255 cisco Montes and Don Santos Orcasitas, both documents having reference to the gift and grant which in conformity with law this ayuntamiento has made to Dr. Juan Gid in the lands of El Bracito: and the matter having been discussed with the care the circumstances require, it was resolved to answer the said Don Agapito Albo with regard to his communication of the 16th instant as follows: This ayuntamiento considered that it was its duty to comply, at the instance of a party, with the decree of the 3rd of January of this year, issued by the instituent assembly, sanctioned by His Imperial Majesty and ordered published and complied with, by the governor of this province. For this reason and because also it judged that it was beneficial to these poor people who stand in such great need of learning trades for their improvement, to put in execution the petition of Dr. Juan Gid, the term of three days having expired, it is resolved today to answer the provincial deputy Don Agapito Albo, residing by permission in this town, in the matter of the communication which he addressed to this corporation in accordance with the suggestion made to him by the individuals he names: stating that it is not in the power of this corporation to undo what it thinks it has done in conformity with law and to the benefit of the people who are immediately under its charge. Thus this honorable body resolved, and I communicate it to Your Excellency

in reply to the communication of the 16th instant which Your Excellency was pleased to forward to this body, which was received yesterday the 16th of the same. God preserve Your Excellency many years.

Paso, April 17th, 1823. In the council halls.

JOSÉ YGNACIO RASCON.
EUTIMIO VALVERDE,
Secretary ad Interim of the Corporation.

And in due witness the session of this day agreed unanimously, the said documents remaining in this archive, and, with the exception of the eighth alderman, Don Juan Gil, because he said that he did not want to be responsible, the president and the other
256 members who compose this corporation signed it before me the secretary *ad interim*, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.
JOSÉ MARIA BELARDE.
JOSÉ FRANCISCO CARBAJAL.
JN. MARIA BELARDE.
ANTONIO PRUDENCIO.
JOSÉ MARIA GARCÍA.
SATURNINO AGUIAR.
LORENZO PROVENCIO.
JOSÉ ALBARES.
JN. MARIA PONCE DE LEON, *Secretary.*

Señor alcalde of first election:

Don Santos Orcasitas, resident of this jurisdiction of El Paso, before Your High Honor, in the best form permitted in law, appears and says: That, being a weak man by human nature itself, he must be more prone to error than to accuracy, and having had an attack of lethargy, not very long, and at the moment that he is beginning to recover or to return to himself, he sees that the light which guides and admonishes him to enquire of the first authority to make known to him what harm can result to him from being one in opinion with the authority; none: and thus awakening, as they say, the private opinion is abandoned and detested, and that of the authority is assented to in all its parts: having the kindness to receive this, my solicitation, upon this common paper as there is none of any seal. I swear not to be in bad faith, and what is necessary, etc.

Paso, April 19th, 1823.

SANTOS ORCASITAS.

Received. Let it be attached to the expediente.

RASCON.

COUNCIL HALLS OF EL PASO, *April* 23*rd*, 1823.

257 Today Don Juan Gid has presented a map made by the mathematician Don Guillermo Box, by observing the courses and in conformity with the measurements made of the land of El Bracito. And as it appears to this corporation very useful to attach it to this expediente, for the clearness and certainty at all times of what has been done, let it so be done; and by the present order of this illustrious ayuntamiento, thus it so determined and ordered and signed it before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.
JOSÉ MARIA BELARDE.
JOSE FRANCISCO CARBAJAL.
JUAN MARIA BARELA.
ANTONIO PRUDENCIO.
JOSÉ MARIA GARCÍA.
JOSÉ MANUEL GARCÍA.
SATURNINO AGUIAR.
LORENZO PROVENCIO.
JOSÉ ALBARES.
JUAN MARIA PONCE DE LEON, *Secretary.*

COUNCIL HALLS, *April* 25*th*, 1823.

It appearing to this ayuntamiento to be desirable to aggregate to the expediente the minute of the resolution which it adopted on the 3rd of the present month relating to the concession of the land of El Bracito to Don Juan Gid, let it so be done for greater clearness and information in the matter. And by the present order, the president of this illustrious corporation so decreed, ordered and signed it, before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JUAN MARIA PONCE DE LEON, *Secretary.*

COUNCIL HALLS OF EL PASO, *April* 25*th*, 1823.

258 The present expediente in which there has been granted to Don Juan Gid, Anglo-American of the United States, the lands of El Bracito for settlement, being considered by this ayuntamiento as closed, proceed to what is to be done under the tariff in force in this ayuntamiento and by its secretary that Juan Gid may know what fees he is to pay for what has been done therein placing the original in the archive as a perpetual testimony, but nevertheless to this shall be sent, together with a certified copy, by the first mail or safe-conduct to the governor of this province for his superior information; another of the same kind being given to the party in interest for his protection. And by the present order the president

and members of this corporation so determined and signed it, before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.
JOSÉ MARIA BELARDE.
JOSÉ FRANCISCO CARBAJAL.
SATURNINO AGUIAR.
JOSÉ MANUEL GARĆIA.
LORENZO PROVENCIO.
JUAN MARIA PONCE DE LEON, *Secretary.*

It is a copy of the original expediente which on petition of Don Juan Gid was made in order to grant to him for settlement the land of El Bracito, in accordance with the colonization plan, together with what is afterward stated: which original remains accordingly in the archive, to which I certify.

JUAN MARIA PONCE DE LEON, *Secretary.* [RUBRIC.]

(Here follows plat, to which is attached the following:)

I, Guillermo Box, citizen of the United States of *the* North *of* America, master mathematician from the State of Missouri: certify in legal form that the foregoing plat (papa) of the place of
259 El Brito for the settlement of artisans whom Dr. Juan Heath is to bring in, is made by me by order of the gentlemen commissioned by the illustrious ayuntamiento of this jurisdiction of El Paso, and in due entries thereof I signed it in said town on the 19th of April, 1823.

GUILLERMO BOX.

It is a copy.

JUAN MARIA PONCE DE LEON, *Secretary.* [RUBRIC.]

COUNCIL HALLS OF EL PASO DEL RIO DEL NORTE,
April 3rd, 1823—third of our independence.

Session of this day, Don Juan Gid, doctor of medicine, of the Anglo-American nation from the States (*sic*) of the Missouri, appeared requesting to know the result of the petition which he made the former ayuntamiento on the 27th of December of last year, through the secretary of state to His Imperial Majesty, and he is answered: that no immediate reply has been received but that the government of this province, through the captain Don José Antonio Viscarra, political and military chief, in an official communication of the 2nd of March, sent the decree of the 3rd of January of this year commanding it to be published and obeyed; which decree was issued by the national instituent assembly (junta national instituyente) and sanctioned by His Imperial Majesty, the thirty-two articles of which treat of colonization matters. These were read to the said Don Juan Gid; and being made acquainted with them, he today makes a new petition asking that by virtue of the law and its privileges he may be given an "hacienda" in the same land

that he has already asked for, offering to perform everything he promises in the said petition, for the good of this town and the Mexican nation.

This corporation having in mind the said colonization laws and the said proposals, which it considered beneficial and useful to this town, after consulting the private individuals, resolved to provide the following in the matter of the petition:

1st. That, saving the superior determination of the gov-
260 ernment to which this shall be given, his proposals and petition are admitted, and when he presents himself, the land he asks for shall be assigned to him in these terms: The head (toma) of the Bracito shall be the central point of the square of said "hacienda;" that is to say, two and a half leagues in a straight line up the river, and two and a half leagues down the river, the same being observed in the sides that form the square.

2nd. That for the reason that this jurisdiction, whose territory extends as far as San Diego only, has its woodlands up the river (rio arriba) and in this direction grazes its stock, Don Juan Gid and his families shall only have the "hacienda," the property of the lands for farming, manufactures and machines, etc., but not in the natural pastures and woods, which shall be common to these inhabitants and its jurisdiction, as they shall be to the new settlers.

3rd. That this minute, and the petition of Don Juan be made known to the public in order that if it should happen that any Mexican citizen of the jurisdiction offers the same propositions for the benefit of the public, promising to comply with the respective articles of the said decree, he may be admitted in preference to every foreigner, for which purpose the term of three days is given, which time will also serve for the people to show if it is their desire to have these neighbors, who offer to them instruction in the trades and industry, by settling in El Bracito, which is about sixteen or eighteen leagues distant from this jurisdiction, and at a place on the frontier, close to the regular habitations of the Apaches.

4th. That Don Juan Gid having the ownership (propiedad) of the lands of the "hacienda," all arrangements shall be made with him by any of the inhabitants of this jurisdiction who may desire to locate at El Bracito for the settlement of that place.

5th. The proposals made by the new settler for the benefit of the town are admitted, hoping that he may execute them, as well as comply with the articles of the colonization decree which have reference to him, this ayuntamiento reminds him that the families which he shall bring must be honest and belong to the
261 Roman Catholic Apostolic religion, the only one of the whole Empire, by whose laws all who settle in it must abide.

6th. That for the designation of the boundaries of the "hacienda" and the possession of the same, some of the alcaldes, one alderman, and one public attorney will go, who together with Don Juan Gid will examine the lands suitable for settlement in the territory of the "hacienda," as well as for agriculture, machines and manufactures, which (land) must be distinguished from that of summer pastures

(agostaderos) and for stock-raising. And it is to be hoped that the new settlers so far as they may be able, will surround themselves with plantations of trees, and that the police order be kept so as to facilitate the spiritual and temporal instructions and administration, this to be in the manner to be provided by the secular and ordinary ecclesiastical authorities, for which purpose this shall be given together with this minute, and an authenticated copy of it shall also be made for the protection and information of the party in interest; this original to remain in the archive together with the petition of Don Juan, as a perpetual testimony. Thus it was resolved by the aldermen, who together with the two alcaldes signed it before me, the secretary of the corporation, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.
JOSÉ MARIA BELARDE.
JOSÉ FRANCISCO CARBAJAL.
JUAN MARIA BARELA.
JOSÉ MANUEL GARCÍA.
JOSÉ MARIA GARCÍA.
JUAN GIL.
LORENZO PROVENCIO.
JOSÉ ALBARES.
JUAN MARIA PONCE DE LEON, *Secretary.*

262 It is a copy of the original to be found in the book of entries of the minutes of this illustrious corporation, which remains in the archive under my charge, to which I certify.

JUAN MARIA PONCE DE LEON, *Secretary.* [RUBRIC.]

Letter Transmitting Petition and Proceedings to Governor.

Mr. GOVERNOR: In consequence of the resolution, made by this corporation on the 3rd of April of this year, upon the petition of Don Juan Gid, an Anglo-American, I forward to Your Excellency a copy of the minute and application, together with the subsequent proceedings up to the full execution of article 4 of the decree of January 3rd of this year relating to colonization, but as the full execution of this law is new in these countries, it has occasioned in two particulars the protest made by Don Agapito Albo, deputy of the province and a lawyer in this town, which I also enclose for the superior information of Your Excellency.

Immediately thereafter, under date of April 17th there were presented to this corporation two petitions of residents of this town praying that to them also and by reason of preference there be granted to each one at least an hacienda up to the river and of this ali of the Bracito. The imitative circumstances of the new settlers and the fact that this corporation has no municipal ordinances regulating the distribution of land that may be useful and beneficial

in promoting settlement, agriculture, arts, etc., place this corporation under the necessity of making known to Your Superiority the resolution, that Your Excellency may be pleased to dictate whatever may be your pleasure in the matter, whether it be by yourself or after consulting the most excellent provincial deputation.

Session of today, 24th of April, 1823.—This place having granted it by the most excellent provincial deputation that territory extends up the river as far as San Diego, distant 40 leagues, resolved
263 as a benefit to this public bring before the government the following articles for its approval, if it should find it convenient.

1st. That, inasmuch as up the river there are only the woods, these and the pastures shall always be common both to the families of the colonists that have been admitted in aggregation and to those of this jurisdiction.

2nd. That the farming lands on both sides of the river be not wasted by giving the property therein to stock-raisers, and that those who apply for them be obligated in the terms of the law to cultivate them, to which end it is proper to caution the public that, in asking and granting these lands, order and proportion be observed, for which a superior regulation is especially desired.

3rd. That an effort be made to keep the 30 families of colonists in the center that all those of this jurisdiction may have the advantage of the model of their industries, arts and instruction which they promise, and in addition to this, and that the intake of water and acequias they shall construct above be used by all those below them who desire to imitate their industries and farms, it being understood that this corporation considers as sufficient without admitting others, the master artisans who are to settle at Bracito, to encourage the imitation of the industry and arts if all the old residents of the jurisdiction who desire and can cultivate the farming lands there are on both sides from here to San Diego and by which there will be obtained the happiness of all, and besides this a great restraint of the Apaches in their transit from this settlement to the interior of the province.

4th. That at 4 or 5 leagues distance in circumference of this town property in lands be given to nobody to the extent offered by the decree of colonization, the timber and pasture up the river being always reserved, and in the matter of water there should always be municipal regulations for its distribution and good order, and it will be convenient for these old inhabitants of the jurisdiction to acquire property in the farming between here and San Diego,
264 leaving as we have said, in the middle those who are to be the instructors in our agriculture and industry.

5th. In order to avoid jealousies among private individuals and interests of some breeders of stock who generally are prejudicial to these in the development of agriculture, and arts, it is observed that this jurisdiction is just beginning, and at the same time gets poorer and poorer if it is not given or provided with industries and arts, and in order to have them in its territory a means therefor is that adopted by virtue of artiele 4, inasmuch as to reject it, diffi-

culties would hereafter arise both because of the scarcity in the national exchequer and the poverty of these residents, for whom this ayuntamiento, to which it very closely belongs to look out for their happiness, has without delay, put in operation the franchise of the law; this corporation stating, nevertheless, that if it has erred in anything, the concession has been made subject to the superior determination. Besides this, it had in mind the fact that the new settler came with a recommendation in his passport from the assembly of the United States, the Government of which was the first that recognized our glorious independence and has admitted in its court the ambassadors of the Empire, recognizing them with every formality.

This ayuntamiento has found it convenient and worthy of public confidence to bring all of the foregoing before Your Excellency and the most excellent provincial deputation, that you may, in view thereof, order what may be just and convenient to remove uncertainties and to proceed with certainty in every matter, which is what is desired.

God preserve Your Excellency many years.

Paso.

JOSÉ YGNO. RASCON.

JUAN MARIA PONCE DE LEON, *Secretary.*

265 DEFENDANTS' EXHIBIT No. 10.

Surveyor General's Report in Reported No. 6.

HUGH STEPHENSON *et al.* } Grant.
vs.
THE UNITED STATES. }

The above case was set for trial on the 1st day of December, 1856.

In the year 1805 Juan Antonio Garcia petitioned Joaquin Real de Alencaster, the governor of the province of New Mexico, for a grant of land in what is now the county of Donna Ana to extend from the Bracito, on the Rio Grande, to the marsh or lake of Trujillo, promising to build a house, erect enclosures, and cultivate the soil, maintaining fifteen men there at his own expense for the purpose of protection until travel and the benefits to be derived from working the mine in the adjoining mountains should attract a sufficient number of persons to form a permanent settlement.

On the 4th day of August, 1805, Joaquin Real de Alencaster, the governor of the province, to whom the petition was addressed, decreed that the grant would be made whenever settlement should be established in the vicinity of the land petitioned for. On the 29th of November, 1816, Juan Antonio Garcia again petitioned Bernardo Bonavia, the commandant general of the State of Durango, for a grant of the land of which he had been in possession since the year 1805 and containing the same boundaries set forth in the petition made by him in that year, stating that there were several individ

uals of El Paso who had volunteered to accompany him in the formation of a settlement, and also promising to plant certain lands for the Apache Indians and furnish them with provisions from the crops he might raise at the above-mentioned place for the purpose of keeping them at peace.

On the 14th of April, 1817, the commandant general referred this petition to the lieutenant governor of El Paso, requiring him to report thereon. On the 29th of June, 1819, Jose Ordas, the lieutenant governor of El Paso, reported in favor of the petition.

266 On the 17th of July, 1817, the commandant general of Durango returned the petition to the lieutenant governor of El Paso, requiring him to enclose the list of persons who were desirous of accompanying Juan Antonio Garcia in the formation of the settlement referred to in his petition and to state the extent of land petitioned for, its distance from the nearest settlement, its resources, &c., and if the settlement and residence of the judicial and ecclesiastical officers could be formed in the centre of the land petitioned for. On the 30th of August the lieutenant governor of El Paso reported that the land contained in length about three leagues and in width from one-fourth to over one league. There was an abundance of water and pastures, and offered every facility for cultivation; that there was difficulty in establishing the settlement and residence of the officers in the centre of the land asked for, and that it was about fifteen leagues distant from the last houses of the town of El Paso, and enclosing the list of those persons who had volunteered to accompany Garcia in the formation of the settlement.

On the 12th of September, 1817, Juan A. Garcia addressed a petition to the lieutenant governor of El Paso, stating that as the circumstances which existed at the time he applied for a grant to the land in question had changed he prayed that no further action should be taken in the premises until requested by him.

On the 18th of February, 1820, the said Garcia again petitioned the governor of New Mexico, stating that those who had volunteered to accompany him in the formation of the settlement had given up the idea of going on account of the many restrictions placed upon the grant, and that as he had been occupying the land for eleven years he hoped that this circumstance would be no reason why the grant should not be made to him alone, and still promising to maintain a small number of armed men at his own expense and build houses, erect enclosures, and cultivate the land which was not occupied by the Indians, concluding his petition by praying that the grant be made to him if convenient to the service of the King.

267 On the 18th of August, 1820, Facundo Melgares, the governor of New Mexico, declined making the grant on a supposed want of authority in the premises and referred the petitioner to the proper authorities in the case.

On the 28th of July, 1821, the said Garcia again petitioned the commandant general of Durango for a grant of the Bracito tract,

recapitulating all the steps he had taken in the premises and the action of the authorities from 1805 up to that date.

Immediately following this petition is to be found a statement, made by a comptroller of the State of Durango, recommending that the grant be made and that the testimony of witnesses be taken in order to ascertain whether the land petitioned for was severed or not from the public domain, and, in case it was not, that an attorney general be appointed to superintend the interests of the public revenue, and that a report be subsequently made in order to ascertain the resources of the land and its adaptation to the raising of stock and cultivation.

On the 17th of January, 1822, the above proceedings were transmitted to the first justice of the town of El Paso, with instructions to comply with the request contained in the statements of the comptroller.

On the 18th of April, 1822, the justice of El Paso proceeded to take the testimony of witnesses as to whether the land was public domain or not, and it was proven by said testimony that the land in question had not been severed from the public domain, but was public land. The above proceedings were then transmitted by George Guerena, the justice aforesaid, to Don José Maria Cordova, of the vicinity of El Paso, who, on the 19th of April of the same year, reported the extent, locality, resources, &c., of the land petitioned for. In order to comply with all the requirements contained in the statement of the comptroller, George Guerena, the justice aforesaid, appointed Julian Bernal as attorney to superintend
268 the interests of the public revenue and transmitting all the proceedings to him, requiring him to report on such matters as appertained to his duties as such attorney. The report of the attorney aforesaid does not appear in full in the documents filed in this office, having been torn off at some period unknown to the claimants.

A certificate given by the second justice of the cantonment Bravos follows the above, certifying that they are true copies of all the papers which could be found in the archives of El Paso relative to the Bracito grant of land and which remained after the destruction of the archives by the United States troops in the year 1846.

On the 30th day of March, 1829, Francisco Garcia y San Juan, son of Juan Antonio Garcia, who departed this life in the year 1828, addressed a petition to the prefect or justice of the opposite side of the River Bravo requesting him, after reviewing the testimony presented to him, showing the occupancy of his father from the commencement of the present century up to the time of his death, in the year 1828, and that a grant was made to him according to law, that he declared him a legitimate owner of the Bracito tract of land.

On the 13th of February, 1849, Francisco Garcia y San Juan petitioned the justice of El Paso to cause certain individuals therein named to appear before him to answer the interrogatories contained in the petition as to whether the witnesses were acquainted with his deceased father and if he resided at the Bracito from the commencement of the present century up to the time of his death; if they

knew that at his own expense he cultivated the lands of El Bracito during his lifetime, and if he was lawfully placed in possession of the land by the competent authorities of the country, and that if he (the son) abandoned the land on account of indolence or on account of the invasions of the Indians.

The answer- to these interrogatories show that Juan Antonio Garcia occupied the Bracito lands during the time mentioned; that he cultivated the same at his own expense; that he was lawfully placed in possession by the competent authorities of the land;
269 that some of the witnesses had the original documents granting the possession in their own hands, and that Francisco Garcia y San Juan abandoned the land on account of the constant attack of the Indians and the hourly exposure of his life.

On the 17th of March, 1849, Juan Maria Ponce de Leon, political chief of the cantonment Bravos, at the request of Francisco Garcia y San Juan, certified that Juan Antonio Garcia, deceased, petitioned for a grant of land at the Bracito; that he resided there for many years, cultivating the soil and raising stock; that, almost at his own expense, he kept the neighboring Indians at peace, and rendered many important services to travellers, and even to the entire nation, until the hostilities and incursions of the Indians drove him away; that, at a subsequent period, a grant of land was made to one John Gid, in the vicinity of El Bracito, and that the limits of Garcia's lands were always excepted from being granted to others, and that he knew all of the above facts, having been appointed a commissioner by the Mexican government to examine the land petitioned for.

Further interrogatories were taken in the year 1849, showing that a grant was actually made to Juan Antonio Garcia by Jose Ordas, who was at the time lieutenant governor of El Paso, and testifying as to the boundaries of the grant.

It is also proven, at the request of Francisco Garcia y San Juan, that the United States troops, during the war with Mexico, in the year 1846, when they took possession of the town, destroyed a large portion of the public archives of El Paso, where the originals of all grants were required to be deposited, thereby preventing the claimants from procuring all the documents necessary to the establishment of their claim.

On the 15th day of September, 1851, the remaining heirs of Juan Antonio Garcia executed powers of attorney to Francisco Garcia y San Juan, authorizing him, in their name, to establish before the Government of the United States any claim they may have
270 had in the said Bracito tract of land, with full power of substitution or revocation; and by virtue of said powers of attorney, on the 16th of September, 1851, the said Francisco Garcia y San Juan substituted Hugh Stephenson, of the county of Donna Ana, in this Territory, to prosecute said claim before the authorities of the United States, vesting in said Stephenson all the rights and privileges he himself had derived from the heirs of the said Juan A. Garcia.

In the same year, 1851, those purporting to be heirs of Juan Antonio Garcia sold the undivided two-thirds of said tract of land to Hugh Stephenson, the present claimant, with the condition that

they would obtain and perpetuate the testimony of the possession of the land by the authorities of the Spanish and Mexican governments to their ancestor, the said Juan Antonio Garcia.

At the May term of the United States district court a petition was filed in chancery by the supposed heirs of Juan Antonio Garcia against Hugh Stephenson for the compliance with the terms of the sale to him made. During the progress of said suit witnesses were examined by order of the court, who proved that said Juan A. Garcia was lawfully seized of the land in dispute, whereupon a survey of the land was ordered to be made by said court and a decree entered "that the defendant pay or cause to be paid the sum of one thousand dollars or its equivalent to the said complainants as the purchase-money of a two-third- interest in the tract of land in said bill mentioned, known as the Bracito tract of land, beginning at a point on the Rio Grande known as the mouth of the Bracito acequia and running south along the said river a distance of three leagues to a lake known as the Trujillo lake, and thence extending back towards the east from said river to a range of sand hills, varying in distance from two to four and a half miles; thence in a northerly direction along said sand hills, varying from two to four and a half miles from the river to a point due east from the place of beginning, and thence to the place of beginning.

It is further ordered, judged, and decreed that upon the payment of the said purchase-money as in said bill specified the said
271 Stephen Archer be directed to survey and divide said tract of land between said complainants and the said Hugh Stephenson, according to the agreement in said bill stated and in said answer confessed to, giving to the said complainants one-third of the said tract of land and the said Hugh Stephenson two-thirds, and report said survey and division to the next term of this court. It is further ordered, adjudged, and decreed that said complainants deed to said defendant, after said survey and division, two-thirds of said tract of land in said bill mentioned, and that said Hugh Stephenson deed to said complainants his right, title, and claim to one-third of said tract of land in said bill mentioned, &c.

The deeds ordered by the court were duly executed, and are filed with the documents presented by the claimants; the survey was also executed, and the plat made by Stephenson Archer is also filed in support of the claim.

The papers acted upon by this office, with the exception of the deeds and plat ordered by the court, are copies of the proceedings had in the United States district court and duly certified by the clerk thereof.

It is not necessary for this office to examine into the validity of the testimony taken by the claimants in support of their claim or whether it is taken in accordance with the requirements of the usage in taking testimony in a foreign country to be used within the United States, there being no instructions to this office other than to receive the testimony presented by claimants, and the question is therefore submitted for the deliberation of Congress.

From the facts set forth in the testimony presented it appears that

Juan Antonio Garcia was in possession of the Bracito tract of land in the year 1805, and that he and those purporting to be his heirs and their assigns have continued in possession of the same up to the present day.

The testimony also shows that a grant was made to Juan Antonio Garcia in the year 1822 or 1823 by Jose Ordas, the lieutenant
272 governor of El Paso; that owing to the destruction of the public archives where such documents were ordered to be kept at that place, in the year 1846, by the American troops, it was impossible for the grant itself or a copy thereof to be presented by the claimants, although diligent search was made for it without success.

The claimants have not presented any testimony to prove that the present claimants are the legal heirs and assignees of Juan Antonio Garcia, deceased. It is the opinion of this office that the case is one covered by the treaty of Guadalupe Hidalgo of 1848 and sustained by the decision of the Supreme Court of the United States in the premises, and that therefore the grant made to Juan Antonio Garcia by the authorities of the Mexican government in the year 1822 or 1823 is a good and valid grant; and as no claim of title is presented to show that the present claimants are the legal heirs and assigns of said Juan Antonio Garcia, it is the opinion of this office that the grant should be confirmed to Juan Antonio Garcia alone.

The case is therefore transmitted to the proper department at Washington for the action of Congress in the premises.

WM. PELLHAM,
Surveyor General.

Surveyor general's office, Santa Fé, New Mexico, December 31, 1856.

273 DEFENDANTS' EXHIBIT DONA ANA BEND COLONY GRANT, REPORTED NO. 85.

TERRITORY OF NEW MEXICO, }
County of Donna Ana. }

To the surveyor general of the Territory of New Mexico:

Your petitioners, the inhabitants of "Doña Ana bend," (El Ancon de Doña Ana,) in the county of Donna Ana and Territory aforesaid, would respectfully represent that, in the year 1839, José Ma. Costales, for himself and others, (more than one hundred in number,) in conformity to the laws and regulations of the government of Mexico, petitioned the prefect of El Paso, and through him to the governor of the State of Chihuahua, for a grant of lands on
274 the east bank of the Rio Grande del Norte, forty or fifty miles above the town of El Paso, at a place known as the "Doña Ana bend."

And your petitioners further state that said grant of land was made to said petitioners and others, and that the same was immediately settled and occupied by them, and that they and their

grantees have, ever since the year 1840, been in the quiet and peaceable possession of the same.

And your petitioners further state that there are now more than three thousand persons residing upon and occupying said lands embraced within the limits of said grant, but your petitioners are unable to state the number of acres contained within said boundaries, as no survey has been made; but the place known as the "bend of Doña Ana" is well known, and the limits and boundaries, as stated in the testimony of Guadalupe Miranda, (herewith filed,) are believed to be correct.

Wherefore your petitioners, with a view that said grant may be confirmed, present for your consideration "a transcript of the expediente formed concerning the adjudication made of the lands of the place called Dona Ana," in the Spanish language, with a correct translation of the same; also the testimony of Yrineo Costales, Francisco Rodrigues, and Guadalupe Miranda; also a rough diagram of the land granted, showing its approximate locality to the government surveys.

All of which is respectfully submitted.

JNO. D. BAIL,
Attorney for the Inhabitants of "Doña Ana Bend."

References to Sketch.

A, B, C, D.—Commons or pasture lands belonging to "Doña Ana Bend grant." The lands between the Rio Grande and the line A, D, are agricultural.

A.—Head of Dona Ana acequia.

D.—Head of Brazito acequia.

H, S, N, M.—Pasture lands belonging to civil colony of Mesilla.

The lands lying between the Rio Grande and the lines Y, X, H, are farming lands belonging to Mesilla grant or civil colony.

The point Y is the initial point named in the Mesilla grant.

The Rio Grande made a change in 1865, and the dotted line on the sketch would mark probably the course now.

The diagram is made on a scale of two miles to the inch.

(Here follows diagram marked p. 275.)

276 *Translation of Muniments.*

(Seal of the State of Chihuahua.)

Secretary's office.

Transcript of the Expediente Formed Concerning the Adjudication Made of the Lands of the Place Called Doña Ana.

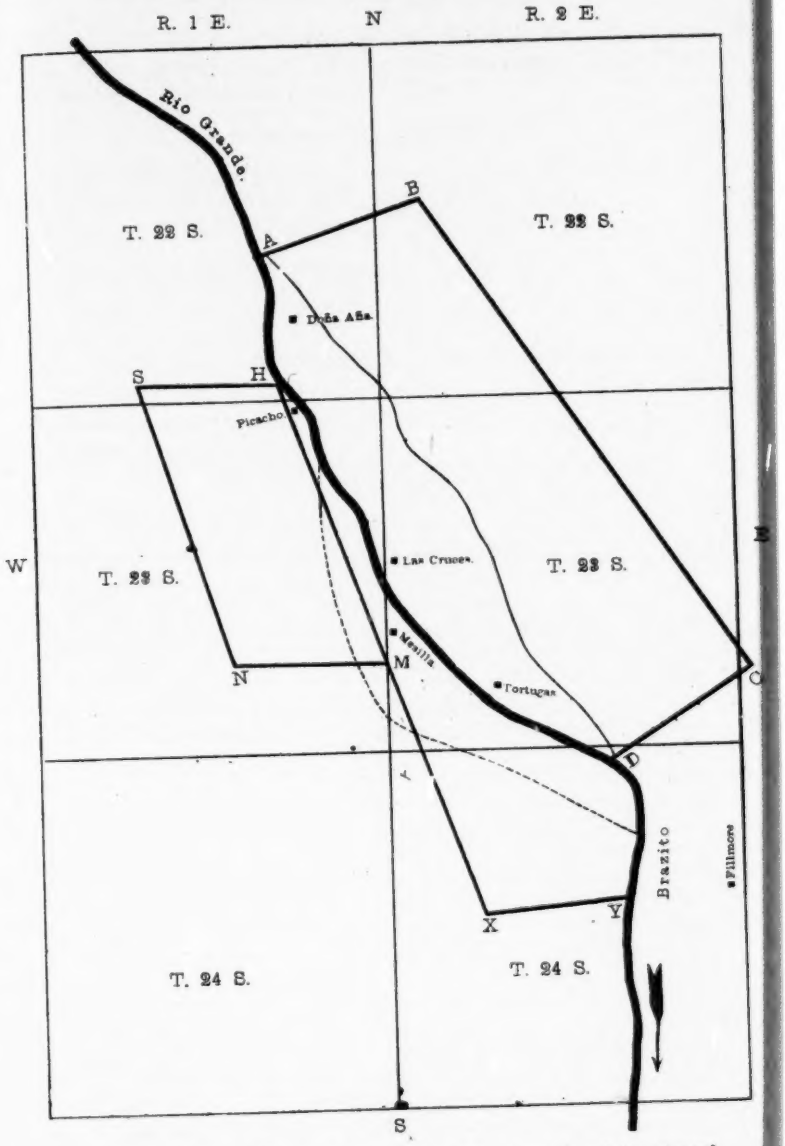
CHIHUAHUA, *March* 28, 1871.

This transcript of expediente, received through the mail express from John D. Bail, of Mesilla, agent of the claimants, and filed in this the office of United States surveyor general for New Mexico, this January 23, 1874.

MILLER, *Chief Clerk.*

[SKETCH MAP.]

Sketch South of Base-line, and East of Meridian of New Mexico.



The Sketch Shows the River as it ran up to 1865. Since then it has changed

No. 78
Cession at } p. 275

Number 60, year of 1840–'42–'43–'44.

Papers in the Grant of Lands which Sundry Citizens of the Town of El Paso Solicit to Settle at the Place Called Dona Ana, in the District of El Paso, Ten Leagues from said Town.

A seal, secretaryship, number 2.

List of the individuals who voluntarily present themselves to colonize the place of Dona Ana, and are the following:

Citizen José Ma. Costales (and 115 others named).

277 Total, 116.

Town of El Paso, 18th of September, 1839.

JOSÉ MA. COSTALES. [A RUBRIC.]

REVENUE OFFICE OF EL PASO [seal 3d, 2 reals].

Habitated for the two years of one thousand eight hundred and thirty-eight and eight hundred and thirty-nine.

Paso, August 21, 1839.

RONQUILLO. [A RUBRIC.]
PADILLA. [A RUBRIC].

Hon. prefect of this district:

The undersigned presents himself in legal form before Your Honor, and says that when the predecessor of your honor, Cayatano Justiniani, governed this district, I presented myself to him verbally, showing that in company with a considerable number of residents of this town we requested that there be granted us to settle the place of Dona Ana, situated up the river from this locality, and for this purpose we applied to the gentleman mentioned with the object that he would inform us what number of citizens were necessary to obtain the success of that application. He replied to me that with a hundred men it was sufficient to obtain the favor we ask, assuring me that as soon as they were completed I should make a list of their names, forwarding the latter through a formal petition, so that being placed in his hands he might give it the proper course

278 with the necessary report for the final action of the government. Relying upon so generous an offer, I have diligently completed the number of men that was suggested to me, with some increase, as is seen by the list that I duly accompany, asking him earnestly to give it the proper action so as to obtain the success of what we so much desire, for the concomitant benefits thereof cannot escape the observation of Your Honor, not only to those who solicit, but in general to all this vicinity. I omit for the present to state the conditions with which such an enterprise should be assured, for I properly understand that the privileges of new settlers are subsisting, confining myself only to asking of Your Honor that when you have the goodness to announce your report, the conditions of the increase may be ascertained. Therefore I humbly pray that Your Honor, in consideration of the benefits that must abound from the aforesaid re-

port, you consider as becomes the high duties devolving upon you. I declare the non-dissimulation and as is necessary, &c.

Town of El Paso, 18th of September, 1839.

JOSÉ MA. COSTALES. [A RUBRIC.]

MOST EXCELLENT SIR: The place Dona Ana, distant from this town ten leagues, a little more or less, possesses abundant and fertile lands to cultivate, and for other purposes it facilitates with small labor the taking of water to cultivate them by irrigation, and altogether has all the advantages that a new settler needs to obtain the object he desires. For these reasons and the many others of more weight that are within the observation of Your Excellency, I will not stop to show you that I find no obstacle sufficient for denying to the petitioners their application, which has for its object the increasing of the population, so necessary for the welfare of a country in all times and circumstances. This is what I can say to Your Excellency upon the subject, in order that in view thereof you may decide according to your superior pleasure.

Paso, October 18, 1839.

JOSÉ YGO. RONQUILLO. [A RUBRIC.]
PEDRO TRUJILLO. [A RUBRIC.]
Secretary pro Tempore.

Prefecture of the district of El Paso, No. 177:

I have the honor to direct to Your Excellency, with the report that I have believed just, the accompanying petition of the citizens of this place, José Ma. Corrales, that you be pleased to report thereon to the honorable the governor, so that he may determine as he sees proper.

God and liberty, Paso, October 18, 1839.

JOSÉ YGO. RONQUILLO. [A RUBRIC.]
PEDRO TRUJILLO. [A RUBRIC.]
Sec. pro Tem.

CHIHUAHUA, *November* 9, 1839.

To the most excellent departmental assembly:

J. MARIA YRIGOYEN. [A RUBRIC.]

MOST EXCELLENT SIR: The petition of certain citizens of the town of El Paso, only asking that there be adjudicated to them the lands of the place called Dona Ana, distant ten leagues from the aforesaid town, is without doubt admissible. Inasmuch as it contemplates nothing less than the encouragement of industry, for as stated by the honorable prefect of El Paso, in his report, that place being settled by the applicants, they will cultivate the fertile lands
the place contains. This result, as well as that of increasing
279 the population, which is so important to all society, and on
the other hand to prevent idleness, to which many of the interested may give themselves up as they have not a single piece of land to obtain their subsistence from, prompts the board to rec-

ommend that, in conformity with the laws of colonization, there be granted to the applicants the quantity of land allowed them thereunder, investing them equally with all the concessions and privileges the laws concede to new settlers.

This is its opinion. Nevertheless, Your Excellency will resolve in this particular that which you deem proper and just.

Chihuahua, December 5, 1839.

PEDRO OLIVARES. [A RUBRIC.]
JUAN NEGRETE. [A RUBRIC.]

JULY 8, 1840.

In conformity with the advice of the excellent assembly, these papers will be passed to the chief of the geographical bureau, that he forthwith, and bearing in mind the laws on the subject, consider the conditions in which should be made the adjudication of the lands applied for.

[A RUBRIC.]

Bureau of the geographical board of Chihuahua.

MOST EXCELLENT SIR: I comply today with the order of Your Excellency, of date the 8th of July instant, requiring me to report the conditions upon which the grant of lands should be made to the one hundred and sixteen citizens that ask it at the place of Dona Ana; and upon doing so only my satisfaction is not complete for the just fear that attends me that my investigation has not produced the desired result that Your Excellency has promised yourself. The circumstances of the colonization proposed not being according to my understanding a true colonization, as the grant of land therein asked for is sought by inhabitants all of the department and even of the same district of El Paso; the fear that my belief might be erroneous in the matter; the difficulty which met me whether or not this regulation should be governed by the general laws of colonization of the Republic or the special ones of the State; the doubt whether some of these will be applicable, so as not to have an obvious conflict with the existing system of government; the circumstance that the authority dictating the regulation might not be a legislative one, and having to express therein without exceeding the powers of the government rules that regulate well the establishment of the settlement, avoiding at the same time some evils that might be apprehended, were reasons that delayed my action and deprived me of the pleasure of having sent to Your Excellency this report with the promptness that was perhaps desired. It will afford me the greatest satisfaction, if it is in conformity with the desires of Your Excellency; should it be the reverse, Your Excellency can correct it as well in the substance as in the form as you please in your superior pleasure.

Chihuahua, July 30, 1840.

JOSÉ RODRIGO GARCIA. [A RUBRIC.]

Geographical bureau of Chihuahua.

Regulation Preliminary to the Granting of Lands of Dona Ana Among Various Individuals of the District of El Paso Who Have Asked for Them.

Article 1. There is conceded to the one hundred and sixteen citizens, that through the honorable prefect of El Paso asked for
280 the grant of lands at the place Dona Ana, the necessary permission to proceed to settle the point referred to.

Art. 2. To each person of the petitioners who may proceed to establish himself there there will be granted, should he be the head of a family, the quantity of land included in a square whose side has seven hundred and eighty varas and a half in length; and if he should not be, that which is contained in a parallelogram of equal length and the half of the before-mentioned quantity in breadth. It will be understood that this land is granted that it may contain his irrigable land.

Art 3. Wherever it may seem most proper in the judgment of the honorable prefect of the district to establish the town there will be measured an area equal to the eighth part of a "sitio de ganado mayor," or twenty-five hundred varas of length and twelve hundred and fifty width, which shall be set aside for the commons of the town. At the selection by the prefect of the spot spoken of he will be governed as far as possible by the provisions of chapter 5 of the reglamentory law, No. 32, date of 18th of November, '33, enacted by the congress of the State.

Art. 4. For the better regularity of the town, the honorable prefect will take care to divide it off in squares of one hundred varas in length and fifty in breadth, with streets between of twelve and a half varas of width.

Art. 5. Each one of the present petitioners will be favored with the half of a square, or a surface of fifty varas on a side, that he may locate his residence thereon—taking care that these possessions are adjoining one to the other for the better security of the place. In the most central part of the latter there will be taken four squares; two that are adjoining lengthwise will form the plaza, and the other two will be appropriated for the town-house, church, and minister's residence, when there shall be any.

Art. 6. The petitioners should remove to that place as quickly as possible, under the direction of the honorable prefect of the district, who will make them the distribution of the lands according to the provisions of this regulation and the existing laws.

Art. 7. None of these can withdraw from the place before two years, without the previous permission of the government, and those that do so shall forfeit the lands that may have been given them.

Art. 8. The settlement will remain for the present subject to the honorable prefect of the district of El Paso, to be considered as belonging to the district of the same name.

Art. 9. The lots being assigned and the families established upon them, the municipal government of the town will be regulated in conformity with the provisions of the reglamentory law of 20th of

March, 1837, and in accordance also with the regulation issued by the excellent departmental assembly, and ordered to be observed by this superior government on the 2d of November, 1839.

Art. 10. The maximum term of time conceded to the settlers to remove to the point they solicit will be three months, counting from the day in which is received this ordinance by the respective prefectures. The individual who shall not within that time repair to receive the lands corresponding to him, should make appear before that authority the legal impediment that might have detained him; or, if the contrary, he will lose the right that by the foregoing articles was conceded him.

Art. 11. Immediately after the half and one more of the colonists have assembled at Dona Ana, the honorable prefect will proceed to establish for them their municipal government agreeably to
281 the provisions of article 9 of this regulation, naming a proprietary judge and an alternate; which this government authorizes him to do in virtue of the power granted it in article 7 of the order of November 2, aforesaid.

Art. 12. All national citizens who in the term of one year, counting from the day spoken of in article 10, present themselves asking lands in the place referred to, will be granted the same as the new settlers, except the land designated to the latter for residences in the center of the settlement. To no alien will entrance in the latter be permitted without he has shown to the political authority the proper passport.

Art. 13. The petitioners of which the previous article speaks should address themselves to this government, through their respective prefects, who, in supplying the necessary information, will do it with the knowledge he has of the industry and integrity of the claimant.

Art. 14. As the persons referred to in the two preceding articles, upon establishing themselves in the new colony, enter upon the enjoyment of conveniences proportionate to the work of their predecessors, to the end that like them they may contribute to the prosperity of the settlement, they will pay five per cent. calculated upon the just value of the land granted them. This tax will be exacted but once, and will be applied to the fund of ways and means.

Art. 15. There will also be applied to the creating of the fund of ways and means, the price of the lots situated in the commons of the settlement, which may be sold at the valuation designated for them.

Art. 16. In the grants that may be made to the new applicants, care shall be taken that they be situated in places immediately following those already granted.

Art. 17. As well these as the first settlers may acquire title by purchase up to three suertes equal to the amount granted of land to be cultivated and an entire square of those established for residence.

Art. 18. The price of the suertes and lots mentioned will be for the present one-half of their present value in the town of El Paso.

Art. 19. The particular obligations of the new settlers are—

1st. To begin to prepare their land within the term of six months at most.

2d. To contribute with their assessments established by the laws to the fund of ways and other funds therein designated.

3d. To present themselves armed upon the calls of the political or military authority, alternating half about all the persons capable of bearing arms, in the ordinary cases that may arise. When imminent danger calls for a greater number of men, they shall all come forward that have been called for by the authority.

4th. To contribute with their personal services in the construction of a dam or acequia and to the repair or reconstruction whenever the civil authority shall deem it necessary. Their successors shall each bear the same obligations.

Art. 20. The honorable prefect of the district will concede to the new settlers the water necessary for their fields, reporting to this government concerning the manner in which he may believe the distribution thereof should be made, and the manner in which irrigation should be regulated.

Art. 21. The individual who for two consecutive years shall be proved before the prefect of the district to be the hardest worker or most industrious of the place shall be rewarded with half a suerte of land of those assigned to the heads of families. This reward remains standing only for the term of the first four years.

Art. 22. The ordinary municipal fees that the new settlers
282 will pay will be the same as are now customary at the capital of the district to which the settlement remains subject.

Art. 23. The government will endeavor in conjunction with the illustrious bishop to see that they be supplied with a parish priest to administer to their necessary wants.

Art. 24. They will not pay tithes for the products they raise from the new fields according to the provisions on this subject of the law, but what may be established by agreement with the said minister.

Art. 25. The obligations, rights, and concessions of which the present regulation treats will be considered to be established without prejudice to what may have been determined in the premises in the regulation of colonization issued on the 24th of September, 1827, by the congress of the State and the other existing provisions.

Chihuahua, July 30, 1840.

JOSÉ RODRIGO GARCIA. [A RUBRIC.]

Geographical bureau of the department.

By virtue of your official communication, dated upon the 8th instant, and in consequence of the concurrence of his excellency the governor placed at the end of the document with which you by order of His Excellency are pleased to accompany the former, I have informed myself concerning the petition which one hundred and sixteen citizens of the district of El Paso have addressed to the

superior government relative to the granting of lands at the place called Dona Ana. I comply today with the superior decree referred to, and have the satisfaction to transmit to you the report. I have deemed proper that you be pleased to place it in the hands of his excellency the governor, assuring him of my respects, and receiving yourself my considerations and esteem.

God and liberty, Chihuahua, July 30, 1840.

JOSÉ RODRIGO GARCIA. [A RUBRIC.]

Honorable secretary of state of the department.

JULY 31.

The regulation which the director of the geographical bureau presented is provisionally approved, and in pursuance thereof the necessary orders will be given to the prefect of El Paso whereby, in view of its provisions and the bases that the honorable board recommends in its report of the 5th of December, he may proceed to the adjudication of the lands in the form prescribed, and to establish the settlement, governing himself by the rules specified, with instruction to give an account to the government as soon as what is provided for is executed. For this purpose there will be furnished him in an official copy the proper portion of the documents. Let there be placed notices in the interior assembling settlers, and the supreme government will be informed of the result.

[A RUBRIC.]

EXCELLENT SIR: In consequence of the petition of more than a hundred residents of the town of El Paso del Norte, I have ordered, in conformity with the excellent departmental government office, and bearing in mind the laws on the subject, that there be awarded to them the lands included in the place called Dona Ana, situated from ten to twelve leagues from the said town, upon the road to New Mexico, in a bend that the Rio del Norte forms, with a most beautiful plain, which, with a very little work, can be
283 irrigated from the same river upon the margin of which it lies, forming a valley surrounded by the Sacramento, Soledad, and San Andres mountains upon the other side of the river, and upon this by the Gila, Mimbres, and Magollon mountains, which lands, according to intelligent persons, are very suitable for cultivation. I have been prompted by the claims which the people of El Paso have merited by the constant campaigns they make upon the Indians, to form a new settlement that will remove them farther off, and especially as the settlers are all Mexicans. Your Excellency will be pleased to report this disposition to his excellency the president for his information, and for other purposes proper, tendering at the same time assurances of my greatest consideration.

God and liberty, July 3, 1840.

[A RUBRIC.]

Excellent secretary of the interior.

The excellent departmental junta to whose judgment was submitted for determination the document formed upon the petition of sundry citizens of that town, to the end that they be granted the place Dona Ana, has made the following report:

"MOST EXCELLENT SIR: The petition of some citizens of the town of El Paso praying that there be adjudged them the lands of the place called Dona Ana, distant ten leagues from said town, is without doubt admissible, for it looks to nothing less than the encouragement of industry. For, as stated by his honor the prefect of El Paso in his report, that place being once settled by the petitioners, the rich tillable lands it embraces will be cultivated. This result, as well as the increase of the population, so important to all society, and on the other hand, the prevention of idleness, to which many of those interested might give themselves up in consequence of not having a single span of land to maintain themselves, induces the junta to decide that in conformity with the colonization laws the favor be granted to those interested, by the adjudication of the portion of land they are entitled to thereunder, investing them also with all the concessions and privileges the laws confer upon new settlers. This is their opinion, nevertheless your excellency will resolve as you may consider convenient and just in the premises."

In view of the foregoing report his excellency the governor appended the following decree:

"JULY 8, 1840.

"In conformity with the advice of the excellent junta, this document will pass to the director of the geographical bureau, that at once and in view of the laws upon the subject he determine the conditions on which the adjudication of the lands applied for can be made."

Whereupon the director referred to reported as follows:

"I this day comply with the decree of Your Excellency dated 8th of the present July, relative to my reporting my conditions on which should be made the grant of lands to the hundred and sixteen citizens who ask it at the place Dona Ana, and upon doing so, my satisfaction is not complete only from the just apprehension I experience that my efforts may not produce the result that Your Excellency might have promised yourself. The circumstance that the colonization spoken of is not according to my understanding a true colonization, inasmuch as the grant to lands solicited for it is asked by the inhabitants of the department, and even of the very district of El Paso; the apprehension that my belief may be erroneous
284 in the matter; the difficulty that presented itself to me whether or not this ordinance should conform to the general laws of colonization of the Republic or the special ones of the State; the doubt as to whether some of the latter not having a manifest conflict with the present system of the government might be in force; the circumstance that the decreeing power might not have had legislative authority, and the having to prescribe thereupon without exceeding the faculties of the government regulations that might provide well for the establishment of the settlement, prevent-

ing at the same time some evils that might be apprehended, were motives that delayed my consideration, and deprived me of the pleasure of having forwarded to Your Excellency this report as soon as you perhaps desired. It will afford me the greatest pleasure should it conform to the desires of Your Excellency. Should the reverse be the case, Your Excellency can correct it as well in the matter as in the form, in manner according to your superior pleasure." (Here the regulation written upon page *et seq.*)

And the foregoing regulation depending upon the sanction of his excellency the governor, he has seen proper to approve the same provisionally, and in virtue whereof he directs me to say to you, as I do, that in pursuance of what the same provides, and of the bases prescribed by the excellent junta in its included report, you proceed to the adjudication of the lands applied for, and to establish the settlement according to the rules provided, reporting to this government what shall be done in virtue of this determination.

God and Chihuahua, July 31, 1840. [A RUBRIC.]

Hon. prefect of El Paso.

Hon. prefect of this district:

The undersigned, all residents of this town, appear before your honor with due respect, representing: That, upon the 18th of September last, we addressed to your perfecture a petition asking that we might be given and granted the land known by the name of the Bend of Dona Ana, situated upon the margin of this river, above, in the northern part, distant from this town about ten leagues, somewhat more or less, with the object of working its lands for the purpose of agriculture and pastures near by, for the raising and maintaining of domestic animals necessary and indispensable for this class of industry, leaving its groves of trees, useful for building and other purposes, for the common use, together with those of this town; and inasmuch as up to this date we do not know the disposition it has received, although we are aware that the same was remitted to the government of this department after a report that your prefecture deemed proper to append to it. Impelled by the scarcity of lands which we have experienced since the year 1828, from the freshets of said river carrying off and rendering useless more than half of the small quantity we previously cultivated, we find ourselves obliged, in order to subsist ourselves and our families, to apply anew to your honor, representing with all earnestness that you be pleased to make of this petition such disposition as you shall deem opportune, to the end that with the utmost dispatch what shall be deemed proper for the relief of our calamitous necessity may be determined for us; and in case that for the grant there arise any inability the government may at present have to afford the supplies that the law provides for new settlers. Harassed by the want that afflicts us, we consider the same as furnished, being content with only the grant that we ask, and that a general benefit may result from this new settlement to the nation, employing in this way the labor of its citizens and establishing measurably a bul-
285 wark against the barbarous tribes that surround us on this frontier, facilitating at the same time the most easy commu-

nication with the department of New Mexico, and a sure assistance to the travelers in our trade with that place, as the route leading there has to pass through the center of the settlement to be established. We believe that these facts are evident to the understanding of your honor to such a degree that they are not to be doubted. Therefore, we humbly pray that your honor be pleased to report hereon as you may deem well, with the laudable object of its early disposition, whereby we will receive grace and favor. We declare non-dissimulation, and as necessary, &c.

Town of El Paso, July 3, 1840.

286 MOST EXCELLENT GOVERNOR: In a report of the 18th of September last of this prefecture it has been stated to Your Excellency what is proper relative to the land that the petitioners propose to cultivate. These, from the force of the circumstances in which they now find themselves, by reason of not having lands to cultivate, with other reasons of no less importance, and that are evident to Your Excellency, cause me to abstain from particularizing very much in detail the miseries that afflict this settlement for the want of grain for its subsistence; and if a portion of the laborers of this town do not devote themselves to husbandry, it is clear that they will always continue in the most miserable condition, owing to the want of lands they lack. It being certain that if the freshet of the river in the approaching year is equal to the one just occurred, undoubtedly one-half of this jurisdiction would be lost, together with the town of Real and part of the other towns that the same river has isolated, a motive that obliges the said petitioners to look in time where to live. Notwithstanding the foregoing, Your Excellency in view thereof will determine according to your superior pleasure.

Town of El Paso, July 7, 1840.

JOSÉ MORALES. [A RUBRIC.]
RAMON DIAS DE LA SERNA, [A RUBRIC.]
Secretary.

Prefecture of El Paso, number 100.

I have the honor to communicate to you, with the report that I have believed just, the accompanying petition of sundry citizens of this town, in order that you be pleased to report the same to his excellency the governor, that he may determine as he shall deem well, again enjoining you very particularly upon my part the prompt dispatch of the matter on account of the need that these inhabitants have to carry on their enterprise if the superior government accedes to their request.

God and liberty. Town of El Paso, July 8, 1840.

JOSÉ MORALES. [A RUBRIC.]
RAMON DIAS DE LA SERNA, [A RUBRIC.]
Secretary.

Secretary of the superior government of the department of Chihuahua.

AUGUST 4.

That the present governor was aware since he entered upon the administration what an advantage would be to the welfare
287 of the people of El Paso the establishment and settlement of the place of Dona Ana, and that he had the pleasure to issue on the 31st ultimo the necessary orders to that end, with all the requisites the law prescribes.

[A RUBRIC.]

The present most excellent governor, Francisco Garcia Conde, was aware since his entering the government how proper and beneficial would be for the welfare of the people of El Paso the establishment and settlement of the place Dona Ana, that some individuals had solicited by petition on the 18th of September of the last year, which was found pending in this secretaryship, and therefore His Excellency was pleased to issue, upon the 31st ultimo, the necessary orders to your prefecture to proceed to the granting of said lands and establishment of the settlement with all the requisites required by the laws. All of which I communicate to your honor by his order, and in reply to your official note relative thereto of the 8th of the said month, with which you accompany a new petition on the subject from the citizens interested of this town.

God and liberty, Chihuahua, August 5, 1840.

His honor prefect of El Paso:

Under date of 18th of September, 1839, one hundred and sixteen citizens of the town of El Paso presented themselves to this superior government, through the proper channel, praying that there might be adjudged to them the cultivable lands situated upon the margins of the Rio Bravo (distant ten or twelve leagues north of El Paso) at the place commonly known by the name of Bend of Dona Ana. This government, in consideration of the laudable object these individuals propose, in view of the provisions now in force, as well general as special, that authorize this class of grants, knowing that with this act is protected and encouraged the useful branch of agriculture, one of the fountains most productive of wealth and public prosperity, and finally persuaded that by this means many arms, which in consequence of our unfortunate circumstances of poverty, being as they now are, idle, will become busy and productive, agreed to concede to them, with the concurrence of the most excellent departmental junta, the favor they asked. For this purpose this same government undertook to establish the bases on which the said adjudgment should be proceeded with, bearing in mind in doing so that the same ought to yield a result which would be the more satisfactory in proportion as the grant and the duties by it imposed on the former should be united with his individual interest; for which reason there was conceded to the petitioners for land to cultivate the exclusive title of a caballeria of land to the head of families and the half of that quantity to those that are not, adjudging to each the lot indispensable for a residence in the commons of the new settlement to be established. Also it was not forgotten to leave unap-

propriated the necessary space for the prosperity of the colony, and with this intention it was provided that all natives within the term of one year, counting from the date of the establishment of the colony, might present themselves to the government through the proper channel asking the same favor, it might be conceded them, with some slight modifications, the same being that these individuals entering in possession of the piece of land assigned them shall have to pay for once only 5 per cent. calculated upon its value, and also have to purchase at its full value the lot they may apply for in the settlement, with the object that the former of these products as well as the latter be turned over to the fund of ways and means of the colony; and as this arrangement should be within reach
288 of all the inhabitants of the department, his excellency the governor has directed that this notice be circulated for the purpose indicated, and with that of inviting such honest and industrious poor citizens as may desire to settle in the new colony, reminding them of that wise maxim "that if permanent felicity were compatible with human nature it should be sought in the fields," and that other none the less wise, and much more comprehensive, that serves as a motto of one of our modern enlightened periodicals, to wit, "Of all things that can be undertaken or sought in the world nothing is better, nothing more useful, nothing sweeter or more worthy the free man than agriculture." Which I have the honor to communicate to your honor by direction of his excellency the governor for the proper purposes.

God and liberty, August 13, 1840. [A RUBRIC.]

To the prefects.

Prefecture of Hidalgo, number 356.

By the circular of your honor of the 13th inst., I am advised that one hundred and sixteen residents of the town of El Paso presented themselves to your supreme government asking that there might be adjudged to them the cultivable lands situated on the margins of the Rio Bravo, at the point commonly known by the name of Bend of Dona Ana. They have been granted them in the manner the said circular mentions inviting such industrious men as may desire to settle in said colony to do so with the privileges conceded them, which I will communicate to the inferior authorities of the district, to the end that being published the same will come to the knowledge of the public.

God and liberty, Hidalgo, August 18, 1840.

JOSÉ MA DE ECHAVARRIA. [A RUBRIC.]
JOSÉ LEANDRO MUÑOS, [A RUBRIC.]
Secretary.

Secretary of the government of the department.

Prefecture of El Paso, number 138.

For the purposes contemplated by the superior circular of his excellency the governor, of the 13th instant, relative to inviting

such honest and industrious poor citizens as may desire to settle in the new colony of Dona Ana, I have circulated and ordered the same to be published in all this district under my charge, whereof I advise your honor for your information and for the superior knowledge of his excellency the governor.

God and liberty, town of El Paso, August 28, 1840.

JOSE MORALES. [A RUBRIC.]
RAMON DIAS DE LA SERNA. [A RUBRIC.]

Secretary of the superior government of the department of Chihuahua.

Prefecture of the district of Guadalupe y Calvo.

There is received in this office the circular dated the 13th instant, relative to the new settlement to be formed upon the margin of the Rio Bravo, ten leagues north of the town of Paso del Norte which will be published at this capital, and will be circulated in
289 the district under my charge for the same purposes. You will be pleased to advise his excellency the governor thereof, and to receive my assurances of esteem.

God and liberty, Guadalupe y Calvo, August 23, 1840.

JOSE S. PAREJA, *Secretary.* [A RUBRIC.]
MARIANO SAENZ, *Secretary.* [A RUBRIC.]

Secretary of State of Chihuahua.

Perfecture of El Paso, number 153.

I have the honor to address to your honor with the report I have thought right the accompanying petition of citizen Pascual de la O, and associates for the purpose that you be pleased to report the same to his excellency the governor, for such action as he may deem well.

God and liberty. Town of El Paso, October 19, 1840.

JOSE MORALES. [A RUBRIC.]
RAMON DIAS DE LA SERNA,
Secretary. [A RUBRIC.]

Secretary of the superior government of the department of Chihuahua.

MOST EXCELLENT SIR: The undersigned residents of this pueblo of Cenecú, corresponding to the capital El Paso, come before the

upright and hightoned equity of Your Excellency with due respect to ask the favor which, in consideration of the force of the reasons which justly favor us, we proceed to state; the rigor of the poverty which unhappily afflicts us, the excessive scarcity of all kinds of resources which have failed us, and the increase in our innocent families which in the course of time are increasing, and who are the ones who without fault suffer all these calamitous vicissitudes, that in fact we all undergo, constrain us imperiously to address our sad complaints to the only and beneficent source capable of relieving them. Your Excellency, then, with merciful hand, and for the sake of the noble sentiments of humanity characteristic of you, will please to provide the only remedy there is, and which we will demonstrate, to impede the rapid course borne on by the crisis of indigence which torments us. This remedy is none other than that you be pleased to give to us the right to cultivate, under title and in conformity with the laws, whether by especial grant or at our private expense, that portion of the fertile, abandoned, uncultivated lands found in this pueblo. Perhaps our just request may cause at first sight surprise, but when it is considered that the extent of the lands of the quality mentioned is quite large, so that the small number of natives that this pueblo has never can cultivate them, whether owing to their magnitude or whether owing to the notorious apathy or neglect of the natives; and furthermore when it is observed that our landed possessions are so entirely reduced that their yield is incapable of affording us even in a small degree the indispensable support of our said families, and owing to which we have to experience the serious wants referred to at the beginning; it will be seen as a just consequence that the supreme law of necessity impels us to avail ourselves, by legal means, of this the right of petition, for from its success results no less than a general and private benefit. Although in regard to this may be argued the covetousness, hate, and refined selfishness, qualities which in this class of pueblos have always prevailed among the natives toward their neighbors. It may also be said to us that we might enroll ourselves among the number of settlers of the new colony which is going to be established at the place Dona Ana, corresponding to the capital, the town of El Paso; but although we have abun-
290 dantly such desires, our poor patrimony, which does not consist of anything but the ownership of some very small pieces of land, as we have shown, and our humble hut that answers for a home, deprives us absolutely of that favor, or the facilities which the kind good will of Your Excellency has been pleased to offer us, at the same time being an obstacle to our going there the abandonment of the few effects we hold in our own right as residents of this pueblo, there not being anybody wishing to purchase them, and from the product of which we might outfit ourselves with the indispensable articles for becoming settlers of the new colonial establishment.

Therefore we humbly pray that Your Excellency be pleased to

heed our submissive prayer whereby we will receive particular favor, and for which we will always live in perpetual remembrance.

Cenecú, October 10, 1840, E. S.

PARCUAL DE LA O.
CANDELARIO GONZALES.
JUAN ANTO. GARCIA.
SATURNINO ALVILLAN.
MARCELO OROSCO.
CALIXTRO LEYVA.
ENCAMACION ROMERO.
JOSÉ MA. GONZALEZ.
PABLO ALVILLAR.
JUAN PABLO ARCE DE MADRID.
JOSE VICENTE LOPEZ.
CRISTOBAL OROSCO.
NICOLAS PACHECO.
GABRIEL CORDERO.
JOSÉ BLAS DURAN.
SIMON GUERRA.
JOSE BLAS RIVERA.
TEODORO BENAVIDEZ.
ANASTACIO CANDO.
TOMAS GRIEGO.
JOSÉ DE LOS ANGELES CURERO.
JOSÉ JAVELA.
JOSÉ VELARDE.
JOSÉ FELIZ LOPEZ.
GREGORIO MONTOYA.
ANTONIO JARAMILLO.
BAUTISTA GRIEGO.
SILVESTRE PASOS.
EUGENIO LOPEZ.
JOSÉ SOTO.
COSME RIOS.
VALENTIN MAESE.

MOST EXCELLENT SIR: Your Excellency being aware of the complaints which the natives of the pueblo of Senecú have repeatedly made, objecting that their lands be occupied by citizens settled in said pueblo, prevents my stating minutely the powerful reasons that hinder acceding to the prayer of the petitioners, who, although true they suffer hardships from the want of lands, can apply for them if they desire to employ themselves in the work of the new colonization of Dona Ana, where there are sufficient affording the conveniences that the industrious men should desire in human life—all these being reasons that prompted the goodness of Your Excellency to make the concession of lands general of the said colony to all the native citizens who may wish to permanently settle therein. Your Excellency notwithstanding the foregoing will determine according to your superior pleasure.

Town of El Paso, October 19, 1840.

JOSE MORALES. [A RUBRIC.]
RAMON DIAS DE LA SERNA, *Secretary*. [A RUBRIC.]

DECEMBER 15.

In conformity with what is reported by the prefecture this petition is not granted, and the same authority may assure the parties interested that the government will furnish them at the place Dona Ana all the advantages they may desire.

[A RUBRIC.]

291 His excellency, the governor, having examined the petition of some citizens of Senecú, requesting the lands of the

natives, and also the report of Your Honor, showing the just rights of the latter and the difficulties that would result from granting the petition of the former, has been pleased to decree in conformity with Your Honor's report instructing me that in communicating this, I charge you in the name of the government to assure the petitioners that His Excellency will furnish them at the place Dona Ana all the advantages they desire.

I reiterate, &c. God and liberty, December 15, 1840.

His honor the prefect of El Paso. [A RUBRIC.]

Number 179.

The day having arrived on which the settlers of the new colony of Doña Ana were to set out, a portion of them excused themselves on account of fear of the enemy; those that remained and are anxious to commence the enterprise are prevented by their poverty. The small number of men which is not sufficient to repel at that place any attack that might occur, comprehending which they earnestly request that the time may be extended to them until the 1st of the month of February of the coming year, to start for the said place, as well in order in that time to settle some affairs of urgent necessity as to see whether within the same time they enroll other individuals to increase their force; asking furthermore that those who have signed who without legal excuse absent themselves may be compelled to comply with their obligations, for they believe they have excused themselves so as not to assist in the work on the acequia; all of which I communicate to you to the end that you be pleased to inform the most excellent governor thereof, so that His Excellency be pleased if of his superior will to concede to the petitioners the extension they ask; and also whether I may compel those who have excused themselves to go upon the work of the acequia as is requested by those who up to date are steadfast in carrying out their obligation. I protest to you the most sincere considerations of my esteem.

God and liberty, Paso, November 18, 1840.

Secretary of the government of the department.

A copy.—Town of El Paso, June 9, 1842.

J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

The most excellent governor desires to know the reasons that have delayed the fulfillment of the order that was communicated to your prefecture on the 31st of July, 1840, for the granting of the lands of Dona Ana and the establishment of a new settlement at that point. His Excellency therefore expects the proper report which Your Honor will be pleased to make with the dispatch the importance of the subject suggests.

God and liberty, El Paso, June 8, 1842. [A RUBRIC.]

His honor prefect of El Paso.

Prefecture of the district of El Paso, No. 12.

This office having been occupied searching out and bringing to light any relative antecedents which may have relation to the pre-

liminaries which have hitherto embarrassed the establish-
292 ment of a new colony upon the lands of Dona Ana, treated of by the superior order of the most excellent governor dated July 31, 1840, to which your note of the 8th instant, about requesting the proper report, refers, only finds a communication dated 18th of November of said year, in which it is stated the greater part of the colonists excused themselves from carrying into effect their agreement from fear of the Apache enemy, and the balance requested that the time might be extended them until the ensuing February, as is shown in detail by the copy that I forward you, that you may be pleased to communicate the same to the most excellent governor in compliance with what is required of me in the premises by the said order.

God and liberty, town of El Paso, June 9, 1842.

JOAQUIN VELARDE. [A RUBRIC.]
J. DOLORES MADRID, *Secretary*. [A RUBRIC.]

Secretary of state of the department.

Prefecture of the district of El Paso, No. 28.

With the report that has seemed to me proper, I have the honor to accompany to you the petition which the settlers of the bend of Doña Ana address to the most excellent governor, which petition is appended to the expediente which this prefecture has formed in the matter, which you will be pleased to place before the superior intelligence of His Excellency so that he may add his determination.

God and liberty, town of El Paso, April 19, 1843.

MAURICIO UGARTE, [A RUBRIC.]
J. DOLORES MADRID, *Secretary*. [A RUBRIC.]

Secretary of state of the department.

TOWN OF EL PASO, *April* 19, 1843.

Let the regulation and order of the junta appearing in the expediente be observed in the settlement of Doña Ana as the general headquarters will soon properly provide, as to the detachment and arms asked for, inasmuch as the settlers will be exempted from military service, but in their turn they will render that service, for from the general tax they cannot be exempted. The request made by citizens of other towns cannot be acceded to; that although the governor desires personally to become acquainted with the locality of the settlement, his pressing engagements and business that require his attention in Chihuahua do not permit him to go there. They are permitted for this year to work the lands they apply for, his excellency the governor desiring that, without loss of time, be carried into effect the settlement of the bend of Doña Ana. In view of the expediente in the matter which you furnish me with your note of today, His Excellency has directed that the regulation on this subject, issued on July 31, 1840, be observed, and which appears in the expediente referred to, which I return to Your Honor,

for the same embraces all that is necessary to enable your prefecture to act in this matter with due correctness, and His Excellency therefore desires that Your Honor at once give the people orders to the end that the settlement of Doña Ana receive the necessary impulse. In regard to the petition which some of the colonists at the said point have recently addressed to His Excellency, and which has been added to the expediente, his excellency the governor directs that Your Honor be informed, as I do inform you, that the general headquarters are now giving the proper orders for the purpose of furnishing some detachments arms and ammunition as they ask,
293 that the settlers of Dona Ana remain exempted from military service, for this will be rendered by them only in their town in such manner as may be necessary; they thus cannot be exempted from the payment of taxes, for these are imposed by the supreme government, whose dispositions the most excellent governor cannot alter, nor can he accede to the request they make for citizens of other towns for the construction of the acequia, for those works belong exclusively to the settlers, who only partake of the benefits of the law; that pressing affairs requiring the attention of His Excellency in Chihuahua, he cannot, though he desires, go personally to the land to be settled, as he will do upon another occasion, when he visits this frontier; and finally that there is conceded to those that sign the before-mentioned petition with such others as may be in the same situation to cultivate the lands they ask for this year, until there is distributed to them their land according to the regulation cited, and the laws on the subject. His Excellency hopes that Your Honor with your characteristic energy will act in this matter until you overcome the obstacles presenting themselves, so that the settlement at Dona Ana have effect, to which end the most excellent governor also desires that Your Honor have published this order and cause the same to reach the knowledge of the parties interested; Your Honor reporting to this government all the results in the premises.

God, &c. Town of El Paso, April 19, 1843.

His honor the prefect of the town of El Paso.

AUGUST 10, 1843.

Let the prefect be interrogated as to the condition the settlement of Doña Ana is now in.

MARTINEZ. [A RUBRIC.]

SECTION 1. The most excellent governor desiring to know in what condition the settlement of the bend called the bend of Doña Ana now is, which matter this government commended to Your Honor in an order that I communicated to you under date 19th of April last, he directs me to request of you a report upon this subject, and, in compliance with his order, I inform Your Honor of the same for the consequent ends.

God, &c., August 14, 1843.

Prefect of El Paso.

The prefecture having reported, (it was returned,) the following decree resulted:

CHIHUAHUA, *November* 15, 1843.

This will be returned to the prefecture that it may take the proper measures for ascertaining the truth of the matter, without giving occasion for alarm among the Indians, and that it may furnish in case of necessity any indispensable assistance to the settlers of Dona Ana.

MONTERDE.
BARCENAS, *Secretary.*

Upon the same day this was returned to the prefecture:

Prefecture of the district of El Paso del Norte, number 10.

Although I had devoted myself for the last few days to the formation of the accounts of the branch of taxation *per capita*, of which articles 15 and 34 of the law of April 7 of last year treats,
294 which my predecessors failed to do, so as to forward them by this mail to your superior government, it has not been permitted me to finish on account of being obliged on the 15th inst. to go to the place Dona Ana, for the purpose of distributing the lands to the settler applicants which said superior government has conceded to them. Hence, as well that matter as others that may occur before my return to this town will have to suffer delay in the office, for the reason that it is not permitted to me to deliver the prefecture to the individual the law may designate; the same being according to the regulation of July 31, 1840, on the subject exclusively in charge of the prefect. Be pleased to place this communication in the knowledge of the most excellent governor.

God and liberty, town of El Paso, January 13, 1844.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

Secretary of the government of the department.

SECTION 2. By the note of Your Honor, number 10, of the 13th instant, his excellency the governor is advised that upon the 15th of the same month you would proceed to the place Dona Ana for the purpose of executing the distribution of lands to the settlers applying, taking with you the government of the prefecture with the motive you express; and I advise Your Honor thereof for your information, as directed by His Excellency.

God, &c. January 26, 1844.

[A RUBRIC.]

Prefect of the district of El Paso.

Prefecture of the district of El Paso del Norte, No. 20.

You will be pleased to inform his excellency the governor of my return to this town twelve days after undertaking my trip to Dona Ana, and that the pressure of time does not permit me now to forward the expediente showing the acts I performed, and the titles

for the lands adjudged, for the approbation of His Excellency, but that I will do so opportunely, and with the information I may believe necessary. As the regulation issued for the adjudgment of lands at said place confers that faculty exclusively upon the prefect, and as the latter is twenty leagues distant and overburthened with business by his numerous duties, I request that you be pleased to procure the proper instructions as to whether, whenever many colonists present themselves, the prefect will have to go to distribute the lands, or how this matter should be arranged so as to avoid the delay affecting the other matters peculiar to him, and it might be urgent ones.

God and liberty, town of El Paso, January 31, 1844.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

Secretary of the government of the department.

FEBRUARY 14.

The prefecture may commission such individuals as it may deem suitable for the distribution of lands in cases in which it cannot itself make the same.

[A RUBRIC]

295 SECTION 1. If the prefecture in charge of Your Honor should not, from any cause preventing it, be able itself to make the distribution of lands at the place Dona Ana, to the settlers applying therefor, the same may depute that duty to such individuals as it may deem suitable to perform that operation. His excellency the governor has directed that I communicate this to Your Honor as a reply to the inquiry you make in your note number 20 of 31st January last, which I answer for your information.

God, &c. February 14, 1844.

[A RUBRIC.]

His honor the prefect of the district of El Paso.

Prefecture of the district of El Paso del Norte, No. 93.

The justice of the peace of Dona Ana, under date the 14th instant, states to me the following: "The part which, according to the laws of colonization, is required to be done by all the individuals who have taken possession of lands in this new colony in order that they may obtain from the prefecture under the dignified administration of Your Honor the due title in fee. It is almost impossible to make effective this regulation on account of the misery and scarcities in which these colonists find themselves involved, all of them offering to do it as soon as they harvest the crops of this year. This occasion affords me the opportunity to protest to Your Honor my entire respect." I inclose the same to you, stating, for the information of the most excellent governor, that, owing to this cause,

there has not been issued the respective titles, as I have already reported, nor the lands for house-lots distributed.

God and liberty, town of El Paso, April 19, 1844.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

Secretary of state of the department.

MAY 6.

Entered. [A RUBRIC.]

SECTION 2. By the note of the justice of the peace of Dona Ana, which Your Honor inserts in your letter of April 19 last, his excellency the governor is made aware of the reason why the titles of ownership have not been issued to the settlers of that place for the lands they have acquired, nor the lots for the houses they live in been distributed.

God, &c., May 6, 1844. [A RUBRIC.]

Prefect of the district of El Paso.

Prefecture of El Paso, number 13.

I have forwarded to the justice of the peace of Dona Ana the original expediente formed upon the colonization of that place, empowering him to make the due grants of lands, and issue titles as well to those citizens now located as to those that may go within the term the regulation establishes. In doing so I have had in view the impossibility of acting personally, owing to the repeated incursions of the savages, and having to attend in person to the
296 work upon the river of this town as of vital interest to all its inhabitants; and although I might do it after this as the said justice of the peace of Dona Ana informs me officially that the residents demand their titles, it seems to me proper to do it, as I have stated. You will be pleased to make this known to your superior government for its determination.

God and liberty, El Paso, January 23, 1846.

GUADALUPE MIRANDA. [A RUBRIC.]
JOAQUIN ALVAREZ, *Secretary.* [A RUBRIC.]

Secretary of state of Chihuahua.

The note of Your Honor, No. 13, of 23d of January last, has informed his excellency the governor that that prefecture had forwarded to the justice of the peace of Dona Ana the original expediente formed upon the colonization of that place, empowering him to make the due grants for lands, and issue titles as well to the citizens now located as to those that may go within the term the regulation on the subject prescribes.

God, &c., March 11, 1846. [A RUBRIC.]

Prefect of the district of El Paso.

Roster of the Members of the Auxiliary Company of Infantry of El Paso Who March to the Colony of Dona Ana to Render Their Services.

Sergeant Manuel Provencio.
Corporal José Ma. Lujau.
Soldiers Francisco Provencio.
José Tafoya.
José Vianes.
José Ma. Perea.
José Dolores Apodaca.

Paso, April 30, 1843.

PASO, *August* 12, 1843.

Of the two muskets which were given to Geronimo Lujau, he turned over one of them, which was assigned to José Tafoya, there remaining in possession of the latter the one which was given to him as a soldier.

Expediente Formed Relative to the Colonization of the Bend of Dona Ana Since July, 1840.

Number 3.

In the book for the year 1840, in which this prefecture has registered the communications that are directed to the superior departmental government, there is one found upon pages 17 *et seq.*, of the following tenor:

Number 100.

I have the honor to communicate to you, with the report I have believed just, the accompanying petition of sundry citizens of this town, in order that you be pleased to report the same to his excellency the governor, that he may determine as he shall deem well, again enjoining you, very particularly on my part, the prompt dispatch of the matter on account of the need that these inhabitants have to carry on their enterprise if the superior government accedes to their request.

July 8, 1840.

A copy.

Town of El Paso, April 19, 1843.

J. DOLORES MADRID. [A RUBRIC.]

297 In book third of decrees, circulars, and proclamations, which the prefecture of this district keeps for retained copies, at pages 25 *et seq.*, is found entered a report of the following tenor:

Report upon the petition of sundry citizens of this town who apply to possess the land at Dona Ana, was placed the following:

EXCELLENT SIR: In a report of the 18th of September last of this prefecture, it has been stated to Your Excellency what is proper relative to the lands the petitioners propose to cultivate. These, from the force of the circumstances they now find themselves in, by reason of not having lands to cultivate, with other reasons of no less importance, and that are evident to Your Excellency, cause me to abstain from particularizing very much in detail the miseries that afflict this settlement from the want of grain for its subsistence, and if a portion of the residents of this town do not devote them-

selves to husbandry it is clear that they will always continue in the most miserable condition, owing to the want of the lands they lack, it being certain that if the freshet of the river in the approaching year is equal to the one just occurred, undoubtedly half of this jurisdiction would be lost, together with the town of Real and part of the other towns which the same river has isolated, a motive that obliges the said petitioners to look in time for where to live and not become witnesses of the final ruin.

Notwithstanding the foregoing, Your Excellency, in view thereof, will determine according to your superior pleasure.

Paso, July 7, 1840.

A copy.

Town of El Paso, 19th of April, 1843.

J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

In the book for the year 1839, in which this prefecture has registered the communications it has addressed to the superior departmental government, is found a report to the following effect:

Report Placed Upon the Petition of José Ma. Costales, Its Date 18th of September, 1839.

EXCELLENT SIR: The place Dona Ana, distant from this town ten leagues, a little more or less, possesses abundant and fertile lands to cultivate, and for other purposes. It facilitates with small labor the taking of water to cultivate them by irrigation; and altogether has all the advantages that a new settler needs to obtain the object he desires. For these reasons, and the many others of more weight that are within the observation of Your Excellency, I will not stop to show you that I find no obstacle sufficient for denying to the petitioners their application which has for its object the increasing of the population so necessary for the welfare of a country in all times and circumstances. This is what I can say to Your Excellency on the subject, in order that in view thereof you may decide according to your superior pleasure.

October 18, 1839.

A copy.

Town of El Paso, April 19, 1843.

J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

SECRETARY OF STATE'S OFFICE OF CHIHUAHUA.

The excellent department junta, to whose judgment was submitted by this Government for advice the expediente formed
298 by virtue of the petition of sundry citizens of your town concerning the granting to them of the place Dona Ana, has made the following report:

MOST EXCELLENT SIR: The petition of some citizens of the town of El Paso, praying that there be adjudged them the lands of the place called Dona Ana, distant ten leagues from said town, is without doubt admissible, for it looks to nothing less than the encour-

agement of industry. For as stated by his honor, the prefect of El Paso, in his report, that place being once settled by the petitioners, the rich tillable lands it embraces will be cultivated. This result, as well as the increase of the population so important to all society, and on the other hand the prevention of idleness, to which many of those interested might give themselves up in consequence of not having a single span of land to maintain themselves, induces the junta to decide that, in conformity with the colonization laws, the favor be granted to those interested by the adjudication of the portion of land they are entitled to thereunder, investing them also with all the concessions and privileges the laws confer upon new settlers. This is their opinion; nevertheless, Your Excellency will resolve as you may consider convenient and just in the premises.

In view of the foregoing report his excellency the governor appended the following decree:

In conformity with the advice of the excellent departmental junta, this expediente will pass to the director of the geographical bureau, that at once, and in view of the laws upon the subject, he determine the conditions on which the adjudication of the lands applied for can be made.

[A RUBRIC.]

Whereupon the director referred to reported as follows:

MOST EXCELLENT SIR: I this day comply with the decree of Your Excellency dated 8th of the present July, relative to my reporting the conditions on which should be made the grant of lands to the one hundred and sixteen citizens who ask it at the place Dona Ana, and upon doing so my satisfaction is not complete, only from the just apprehension I experience that my efforts may not produce the result that Your Excellency might have promised yourself. The circumstance that the colonization spoken of is not, according to my understanding, a true colonization, inasmuch as the grant to lands solicited for it is asked by the inhabitants of the department and even of the very district of El Paso; the apprehension that my belief may be erroneous in the matter; the difficulty that presented itself to me, whether or not this ordinance should conform to the general laws of colonization of the Republic, or the special ones of the State; the doubt as to whether some of the latter, not having a manifest conflict with the present system of the government, might be in force; the circumstance that the decreeing power might not have had legislative authority, and the having to prescribe thereupon without exceeding the faculties of the government regulations that might provide well for the establishment of the settlement, preventing at the same time some evils that might be apprehended, were motives that delayed my consideration, and deprived me of the pleasure of having forwarded to Your Excellency this report as soon as you perhaps desired. It will afford me the greatest pleasure, should it conform to the desires of Your Excellency. Should the reverse be the case, Your Excellency can correct it, as well in the matter as in the form, in manner according to your superior pleasure.

299 Regulation preliminary to the granting of lands of Dona Ana among various individuals of the district of El Paso who have asked for them.

Article 1. There is conceded to the one hundred and sixteen citizens that through the honorable prefect of El Paso ask the grant of lands at the place Dona Ana, the necessary permission to proceed to settle the point referred to.

Art. 2. To each person of the petitioners who may proceed to establish himself there, there will be granted, should he be head of a family, the quantity of land included in a square whose side has seven hundred and eighty varas and a half in length; and if he should not be, that which is contained in a parallelogram of equal length and the half of the before-mentioned quantity in breadth. It will be understood that this land is granted that it may contain his irrigable land.

Art. 3. Wherever it may seem most proper, in the judgment of the honorable prefect of the district, to establish the town, there will be measured an area equal to the eighth part of a "sitio de ganado mayor," or two thousand five hundred varas of length and twelve hundred and fifty width, which shall be set asde for the commons of the town. At the selection by the prefect of the spot spoken of he will be governed as far as possible by the provisions of chapter 5 of the regulamentary law No. 32, dated 18th of November, 1833, enacted by the congress of the State.

Art. 4. For the better regularity of the town, the honorable prefect will take care to divide it off in squares, of one hundred varas in length and fifty in breadth, with streets between of twelve and a half varas of width.

Art. 5. Each one of the present petitioners will be favored with the half of a square, or a surface of fifty varas on a side, that he may locate his residence thereon, taking care that these possessions are adjoining one to the other for the greater security of the place. In the most central part of the latter there will be taken four squares; two that are adjoining lengthwise will form the plaza, and the other two will be appropriated for the town-house, church, and minister's residence, when there shall be any.

Art. 6. The petitioners should remove to that place as quickly as possible under the direction of the honorable prefect of the district, who will make them the distribution of the lands according to the provisions of this regulation and the existing laws.

Art. 7. None of these can withdraw from the place before two years without previous permission of the government, and those that do so shall forfeit the lands that may have been given them.

Art. 8. The settlement will remain for the present subject to the honorable prefect of the district of El Paso, to be considered as belonging to the district of the same name.

Art. 9. The lots being assigned and the families established upon them, the municipal government of the town will be regulated in conformity with the provisions of the regulamentary law of 20th of March, 1837, and in accordance also with the regulation issued by

the excellent departmental junta, and ordered to be observed by this superior government on the 2d of November, 1839.

Art. 10. The maximum term of time conceded to the settlers to remove to the point they solicit will be three months, counting from the day in which is received this regulation by the respective prefectures. The individuals who shall not within that time
300 repair to receive the lands corresponding to him, shall make appear before that authority the legal impediment that might have detained him; or if the contrary, he will lose the right that by the foregoing articles was conceded him.

Art. 11. Immediately after the half and one more of the colonists have assembled at Dona Ana, the honorable prefect will proceed to establish for them their municipal government agreeably to the provisions of article 9 of this regulation, naming a proprietary judge and an alternate, which this government authorizes him to do in virtue of the power granted it in article 7 of the 2d of November aforesaid.

Art. 12. All national citizens who, in the term of one year, counting from the day spoken of in article 10, present themselves asking lands in the place referred to, will be granted the same as the new settlers, except the land designated to the latter for residences in the center of the settlement. To no alien will entrance in the latter be permitted without he has shown to the political authority the proper passport.

Art. 13. The petitioners of which the previous article speaks should direct themselves to this government through the respective prefects, who upon making the proper report will do so according to his views of the industry and integrity of the applicant.

Art. 14. As the persons referred to in the two preceding articles upon establishing themselves in the new colony, enter upon the enjoyment of conveniences proportionate to the work of their predecessors, to the end that like them they may contribute to the prosperity of the settlement, they will pay five per cent., calculated upon the just value of the land granted them. This tax will be exacted but once and will be applied to the fund of ways and means.

Art. 15. There will also be applied to the creating of the fund of ways and means the price of the lots situated in the commons of the settlement, which may be sold at the valuation designated for them.

Art. 16. In the grants that may be made to the new applicants care shall be taken that they be situated in places immediatly following those already granted.

Art. 17. As well these as the first settlers may acquire title by purchase up to three "suertes" equal to the amount granted of land to be cultivated and an entire square of those established for residence.

Art. 18. The price of the "suertes" and lots mentioned, will be for the present one-half of their present value in the town of El Paso.

Art. 19. The particular obligations of the new settlers are:

1st. To begin to prepare their land within the term of six months.

2d. To contribute with their assessments established by the laws to the fund of ways and other funds therein designated.

3d. To present themselves armed upon the calls of the political or military authority, alternating half about all the persons capable of bearing arms in the ordinary cases that may arise. When imminent danger calls for a greater number of men they shall all come forward that have been called for by the authority.

4th. To contribute with their personal services in the construction of a dam or acequia, and to the repair or reconstruction whenever the civil authority shall deem it necessary. Their successors shall each bear the same obligations.

Art. 20. The honorable prefect of the district will concede to the new settlers the water necessary for their fields, reporting to this government concerning the manner in which he may believe the distribution thereof should be made, and the manner in which irrigation should be regulated.

Art. 21. The individual who for two consecutive years shall prove himself before the prefect of the district to be the hardest
301 worker or most industrious of the place shall be rewarded with half a suerte of land of those assigned to the heads of families. This reward remains standing only for the term of the first four years.

Art. 22. The ordinary municipal fees that the new settlers shall pay will be the same as are now customary at the capital of the district to which the settlement remains subject.

Art. 23. The government will endeavor, in conjunction with the illustrious bishop, to see that they be supplied with a parish priest to administer to their spiritual wants.

Art. 24. They will not pay tithes for the products they raise from the new fields according to the provisions on this subject of the law, but what may be established by agreement with the said minister.

Art. 25. The obligations, rights, and concessions of which the present regulation treats, will be considered to be established without prejudice to what may have been determined in the premises in the regulation of colonization issued on the 24th of September, 1827, by the congress of the State and the other existing provisions.

And the foregoing regulation depending upon the sanction of the most excellent governor, he has seen proper to approve the same provisionally in virtue whereof he directs me to say to Your Honor, as I do, that in pursuance of what the same provides, and of the bases prescribed by the excellent junta in its included report, Your Honor proceed to the adjudgment of the lands applied for, and to establish the settlement according to the rules provided, reporting to this government what shall be done in virtue of this determination.

God and liberty, Chihuahua, July 31, 1840.

AMADO DE LA VEGA. [A RUBRIC.]

Hon. prefect of the district of El Paso.

SECRETARY OF STATE'S OFFICE OF CHIHUAHUA.

The present most excellent governor, Francisco Garcia Conde, was aware since his assuming the government, how proper and beneficial would be for the welfare of the people of El Paso, the establishment and settlement of the place Dona Ana that some individuals had solicited by petition on the 18th of September of last year, which was found pending in this secretaryship, and therefore His Excellency was pleased to issue upon the 31st ultimo the necessary orders to your perfecture to proceed to the granting of said lands and establishment of the settlement with all the requisites required by the laws. All of which I communicate to Your Honor by his order, and in reply to your official note relative thereto of the 8th of the said month with which you accompany a new petition on the subject from the citizens interested of your town.

God and liberty, August 5, 1840.

AMADO DE LA VEGA. [A RUBRIC.]

His honor the prefect of El Paso.

(*Circular.*)

OFFICE OF SECRETARY OF STATE OF CHIHUAHUA.

Under date of 18th of September, 1839, one hundred and sixteen citizens of the town of El Paso presented themselves to this superior government through the proper channel, praying that there might be adjudged to them the cultivable lands situated upon the margins of the Rio Bravo (distant ten or twelve leagues north of El Paso,) at the place commonly known by the name of bend of Doña
302 Ana. This government, in consideration of the laudable object these individuals propose in view of the provisions now in force, as well general as special, that authorize this class of grants, knowing that with this act is protected and encouraged the useful branch of agriculture one of the fountains most productive of wealth and public prosperity, and finally persuaded that by this means many arms which in consequence of our unfortunate circumstances of poverty being as they now are idle, will become busy and productive, agreed to concede to them with the concurrence of the excellent departmental junta the favor they asked. For this purpose this same government undertook to establish the bases on which the said adjudgment should be proceeded with, bearing in mind, in doing so, that the same ought to yield a result which would be the more satisfactory in proportion as the grant and the duties by it imposed on the farmer should be united with his individual interest; for which reason there was conceded to the petitioners for land to cultivate the exclusive title of a caballeria of land to the heads of families, and the half of that quantity to those that are not, adjudging to each the lot indispensable for a residence in the commons of the new settlement to be established; also it was not forgotten to leave unappropriated the necessary space for the prosperity of the colony, and with this intention it was provided that all natives who within the term of one year, counting from the

date of the establishment of the colony, might present themselves to the government through the proper channel asking the same favor, it might be conceded them with some slight modifications, the same being that these individuals entering in possession of the piece of land assigned them shall have to pay for once only five per cent. calculated upon its value, and also have to purchase at its full value the lot they may apply for in the settlement, with the object that the former of these products as well as the latter be turned over to the fund of ways and means of the colony; and as this arrangement should be within reach of all the inhabitants of the department, the most excellent governor has directed that this notice be circulated for the purpose indicated, and with that of inviting such honest and industrious poor citizens as may desire to settle in the new colony, reminding them of that wise maxim "that if permanent felicity were compatible with human nature it should be sought in the fields," and that other none the less wise and much more comprehensive, that serves as a motto of one of our modern enlightened periodicals, to wit, "of all things that can be undertaken or sought in the world, nothing is better, nothing more useful, nothing sweeter or more worthy the free man than agriculture." Which I have the honor to communicate to Your Honor by direction of his excellency the governor for the proper purposes.

God and liberty, Chihuahua, August 13, 1841.

AMADO DE LA VEGA. [A RUBRIC]

His honor prefect of El Paso.

On the 24th of August, 1841, this was circulated throughout the district under my authority.

OFFICE OF SECRETARY OF STATE OF CHIHUAHUA.

His excellency, the governor, having examined the petition of some citizens of Senecú requesting the lands of the natives, and also the report of Your Honor showing the just rights of the latter, and the difficulties that would result from granting the petition of the former, has been pleased to decree in conformity with Your
303 Honor's report instructing me that in communicating this I charge you in the name of the government to assure the petitioners that His Excellency will furnish them at the place Dona Ana all the advantages they desire.

I reiterate to Your Honor my consideration and esteem.

God and liberty, Chihuahua, December 15, 1840.

JUAN N. DE URQUIDE.

His honor the prefect of El Paso.

To his honor the prefect of this district:

We, the citizens, who at the close hereof sign, residents of this town, before Your Honor, with due submission and respect, present ourselves, saying—that being ready to proceed to the point Dona Ana the first of the ensuing month to engage in constructing the acequia to furnish sufficient water for the irrigation of the lands at said point which the kindness of the superior government saw proper to con-

cede under date of 31st July, 1840, that we might colonize the same, in which enterprise the war of the savages and other causes of not less whight have delayed us, there remains to us to ask of Your Honor that you grant us the permission to carry it out. For this purpose we hereby petition, believing confidently that our request will be acceded to, and that an enterprise of so much utility to the nation and general prosperity of the colonists—

We therefore humbly ask and pray Your Honor with the utmost earnestness to be pleased to defer to our prayer, whereby we will receive the favor, grace, and justice we seek.

Town of El Paso, January 26, 1843.

BERNABÉ MONTOYA.	RAMON DIAS DE LA SERNA.
JOSÉ MA. COSTALES.	ELENTERIO PEREA.
CRISTOBAL PROVENCIO.	YRINEO LUJAN.
BRIGIDO PROVENCIO.	RAFAEL PROVENCIO.
NASARO HERRERA.	FRANCISCO TELLEZ.
SANTOS AVALOS.	JOSÉ YNES CORONA.
FELIPE HERRERA.	GREGORIO HERRERA.
PERFECTO AVALOS.	ADANTO TRUJILLO.
CATARINO TRUJILLO.	ESMEREGILDO CANO.
JN. TRUJILLO.	JOSÉ GARCIA.
JOSÉ MA. RODRIGUEZ.	JOSÉ BIANES.
PABLO MELENDRES.	GREGORIO DAVALOS.
JOSÉ MA. BERNAL.	JESUS ALIVARES.
JOSÉ MA. CORDOBA.	JESUS CORDOBA.
JOSÉ ANTONIO GALLEGOS.	JULIO MADRID.
TEODOSO ZAMORA.	BONIFACIO ARMIJO.
ESMEREGILDO MONTAYA.	

Instructions by which Bernabé Montoya will be governed as agent for this prefecture to command the persons who this day proceed to the place of the new settlement of Doña Ana for the purpose of taking out the main acequia, which instructions he will observe while they may be at work at the said place in the manner following:

1st. From the moment in which he shall commence his march from this town for Dona Ana he will take care that the party travel with order sufficient to protect it from any disastrous surprise from enemies.

2d. Being at the said place Dona Ana, he will also take care that in apportioning the labor he has to commence, he do so in such way that they can be protected in case they are attacked by enemies.

304 3d. He will examine with great care the point where the main acequia will be taken out, to the end that upon commencing his work, he will endeavor to obtain all the land possible, inasmuch as thereby depends the welfare of the large population which in time may be formed.

4th. Said main acequia will have for the present the width of two varas, or two and a half, it remaining at the will of the maker thereof to give it the depth the ground may allow, always endeavoring to obtain that the most elevated of the lands may be irrigated.

5th. He will take special care that the course of the said acequia lead to the nearest part of where on account of the elevation or solidity of the ground the town should be formed.

6th. He will take care that the laborers accompanying him perform their tasks in equal proportion, he being by this prefecture authorized to impose such penalties as may be practicable, in view of the circumstance of being in camp, upon those that disobey or do not comply with this precept.

7th. As the events of the camp it is absolutely impossible to foresee with certainty, unless in the presence of the circumstances and casualties occurring, the prefecture leaves it to the judgment of the said Montoya to dictate all measures he may deem proper, for the just object of defending as well himself as at the same time his subordinates, and to advance as fast as possible as his best judgment may dictate to him the beneficent enterprise placed in his charge, and no one whoever it be will violate in any way the orders and determinations of the said Montoya under penalty of the liability which according to the nature of the offense or crime will be made effective against the party by this prefecture upon the report he may make to said prefecture on his return or from that point.

8th. If, after arriving at the point Dona Ana, any citizens of this town or of any other town, whether of this or any other department of our Republic, shall present themselves for the purpose of joining the new settlement, he will admit them, noting, in a roll he will keep, the names, day of their arrival, and lands they are assigned to.

El Paso, February 2, 1843.

MOST EXCELLENT GOVERNOR: The undersigned, citizens of this town and at present settlers of the new colony of Doña Ana, by the grace and favor of your superior government appear before Your Excellency with due submission and respect, representing that in consequence of the number of men being small with whom we have gone to begin the taking out of the water at the said point, owing to not following us all who signed the petition in which we asked that we might be permitted to colonize the aforesaid place, innumerable injuries of considerable magnitude have resulted to us, of which not the least is the being unfinished of the taking of water to the place that we have selected as suitable to make the settlement and to locate our cultivable lands, in virtue of which and believing confidently that Your Excellency has to protect us as far as your ample powers may permit, so that we may carry out an enterprise of the greatest utility to the nation and to ourselves individually, we can do no less than apply to Your Excellency, praying with the greatest earnestness that you be pleased to concede us that which we ask upon the following points:

1st. That we be furnished with a detachment of troops for the safety of our persons and interests.

2d. That we be furnished with a resupply of arms and ammunition.

3d. That there be waived military service to which some of our companions are obligated.

305 4th. That we be exempted from the taxes we suffer.

5th. That we be promptly furnished ten men from each district for the term of eight days so as in this way to finish the acequia, or that all who signed be compelled to repair thereto until its conclusion.

6th. That we be furnished the regulation by which we must govern ourselves in our new colony as was offered us by the predecessor of Your Excellency.

7th. That, should your high and increased engagements permit it, Your Excellency do us the favor to go and become acquainted with our lands, so that you may be persuaded of the advantages that would result to our department by colonizing them.

8th. That if we cannot, owing to the shortness of the time, finish the acequia, we be permitted to go and cultivate this year the lands we have cleared, without prejudice to your ordering that the distribution of the lands be made, and that we take those which may suit us to put our property on. This is what we ask, and therefore we humbly ask that Your Excellency be pleased to defer thereto, whereby we will receive the favor, grace, and justice we seek, being pleased to receive this petition upon this common paper, there being none of the proper stamp in the revenue office at this time, without prejudice to reposition.

Town of El Paso, April 16, 1843.

JOSÉ MA. COSTALES.	BERNABÉ MONTOYA.
RAMON DIAS DE LA SERNA.	PABLO MELENDRES.
JESUS CORDOBA.	JOSÉ YNES CORONA.
JOSÉ MA. RODRIGUEZ.	GERONIMO LUJAN.
ELEUTERIO PERERA.	JOSÉ ANTONIO GALLEGO.
JESUS OLIVARES.	JOSÉ MA. BERUAL.
JOSÉ BIANES.	JOSÉ MA. SIERRA.
GREGORIO DAVALOS.	JOSÉ MA. LUJAN.
TIMOTEO MANTOYA.	PEDRO AGUIRRE.
PEDRO TRUJILLO.	JOSÉ TAFOYA.
JOSÉ MA. VALENCIA.	JULIO MADRID.
TEODOCIO ZAMORA.	JOSÉ MA. CORDOBA.
FELIPE MADRID.	MIGUEL NEVAREZ.

MOST EXCELLENT SIR: Those who sign and are the principal men in this petition presented themselves, in September, 1839, together with other residents of this town, to your superior government, through the proper channel, praying that there might be adjudged them the cultivable lands found on the margins of the Rio Bravo,

known by the name of bend of Doña Ana. The same government granted them, with the concurrence of the excellent departmental junta, the favor they asked in July, 1840; and although after this date the colonists might have put in operation their labors for the purpose indicated, it was prevented by the constant and disastrous war, in which were engaged the savage Indians, and other causes of no less weight which their poverty caused them, until animated by a determination, and taking advantage of the peace that was last year concluded with those hostile to us, addressed to this prefecture on the 26th of January of the present year a new petition, in which they ask, and it was granted them, upon the 2d February last, permission to engage in constructing the main acequia to furnish sufficient water for the irrigation of the lands of said place. It is true all the petitioners have not assisted in the construction of the acequia, and only to the number of eighteen have done so; for which reason I proceed to express my opinion upon the eight points that this petition contains, in the manner following:

306 With respect to the first, it seems that the detachment is unnecessary as the department is in peace, and that the number of troops that might be employed in that place will be more useful in other duties of the service. With respect to the second, eleven muskets, which are now loaned and can be recovered, can well be furnished, but without any ammunition, as there is none, without drawing upon that the garrisons have. What they ask in the third may all be conceded them. The request they make in the fourth can be done when they already place themselves in possession of their lands, paying here temporarily the taxes corresponding to them. With regard to the desire of the fifth, the request seems an exorbitance, since no community can be obliged to lend service to another; the claim of the sixth is answered in the proceedings had that the government might permit them to colonize. With regard to the seventh, it remains with high prerogatives of Your Excellency to concede or deny. With respect to the eighth, the bases upon which they have to begin until the conclusion is regulated. This is what I can state in virtue of what appears in the present petition. But Your Excellency, with your acknowledged judgment, will determine in the matter as you may deem proper.

Town of El Paso, April 17, 1843.

MAURICIO UGARTE. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

OFFICE OF SECRETARY OF STATE OF CHIHUAHUA.

The most excellent governor desiring that without loss of time be carried into effect the settlement of the bend of Doña Ana, in view of the expediente in the matter which you furnish me with your note of today, His Excellency his directed that the regulation on this subject, issued on July 31, 1840, be observed, and which appears in the expediente referred to, which I return to Your Honor, for the same embraces all that is necessary to enable your prefecture to act in this matter with due correctness; and His Excellency therefore desires that Your Honor at once give the proper orders to the end

that the settlement of Doña Ana receive the necessary impulse. In regard to the petition which some of the colonists at the said point have recently addressed to His Excellency, and which has been added to the expediente, the most excellent governor directs that Your Honor be informed, as I do inform you, that the general headquarters are now giving the proper orders for the purpose of furnishing some detachment, arms, and ammunition as they ask; that the settlers of Dona Ana remain exempted from military service, for this will be rendered by them only in their town in such manner as may be necessary; that they cannot be exempted from the payment of taxes, for these are imposed by the supreme government, whose dispositions the most excellent governor cannot alter, nor can he accede to the request for citizens of other towns which they may make for the construction of the acequia, for those works belong exclusively to the settlers, who only partake of the benefits of the law; that pressing affairs requiring the attention of His Excellency in Chihuahua, he cannot, though he desires, go personally to the land to be settled, as he will do upon another occasion when he visits this frontier; and, finally, that there is conceded to those that sign the before-mentioned petition, with such others as may be in the same situation to cultivate the lands they ask for this year, until there is distributed to them their land, according to the regulation cited, and the laws on the subject. His Excellency hopes that Your Honor, with your characteristic energy, will act in this matter until you overcome the obstacles presenting themselves, so that the
307 settlement at Dona Ana have effect, to which end the most excellent governor also desires that Your Honor have published this order and cause the same to reach the knowledge of the parties interested, Your Honor reporting to this government all the results in the premises.

God and liberty, Town of El Paso, April 19, 1843.

JUAN N. BARCENAS, *Secretary.* [A RUBRIC.]

His honor the prefect of this town.

OFFICE OF SECRETARY OF STATE OF CHIHUAHUA.

SECTION 1. The most excellent governor, desiring to know what may be the present condition of the settlement of the bend called Doña Ana, which matter this government recommended to Your Honor, in an order which I communicated to you, under date 19th of April last, he directs me to request of Your Honor a report upon this subject; and in compliance with his order I inform Your Honor thereof for the proper purposes.

God and liberty, Chihuahua, August 14, 1843.

JUAN N. BARCENAS.

To his honor the prefect of the district of El Paso.

MOST EXCELLENT SIR: The bend of Doña Ana is as yet settled by fourteen residents, who are the first settlers. These, overcoming dangers and anxieties, have realized a fair crop of corn of somewhat more or less than a hundred carretas, which make twelve hundred

fanegas, and other products, such as beans, cotton, and other garden stuff, &c. The constancy of these individuals in not abandoning the enterprise, seeing themselves quite frequently in danger of losing their lives by the repeated threatenings of the Apaches, as Your Excellency will perceive from the accompanying order, issued by Citizen Lorenzo Provencio, entitles them to the paternal consideration of your superior government; they, therefore, requesting of the commanding general a detachment of troops larger than the present one; for by its protection those inhabitants will continue and carry forward their labors with greater tranquillity, and the increase of the settlers, who are restrained from doing so by a justified fear of suffering an aggression of the Apaches or Comanches, which they themselves could not resist, would be progressive. If Your Excellency, in whose superior hands it is to have the condescension to order the increase of the said detachment, and to provide arms and ammunition to the new settlers, this prefecture, without being mistaken, can assure you that according to the inclination it observes in many persons to be residents of Dona Ana, upon the return of a couple of years it will be a settlement which will cause itself to be respected by the tribes which today it dreads.

This is what I can report to Your Excellency in the matter, for your superior information and ulterior action.

A copy of the foregoing superior order, and of this report, will be made to remain in this archive, forwarding the original to the secretary who issued it in order that he may be pleased to place it in the superior knowledge of the most excellent governor.

Town of El Paso, 30th of October, 1843.

JOAQUIN VELARDE.

JOSÉ DOLORES MADRID, *Secretary.*

A copy. El Paso, October 30, 1843.

JOSÉ DOLORES MADRID, *Secretary.* [A RUBRIC.]

308 A seal, seal 4th, two reals, years of eighteen hundred and forty-four and eighteen hundred and forty-five.

His honor the prefect of El Paso:

The undersigned, as new settlers of this colony, by a grant which the supreme government made to us therefor, appear before your honor with due submission and respect, representing that finding ourselves upon the ground with everything necessary to commence to work, we ask of your authority, with the greatest earnestness, that you be pleased to have the goodness to come to distribute to us the lands which correspond to each in view of the damages that result to us from letting pass the proper time for the sowing of wheat; for although we have not completed the acequia to the point where it should be, we judge that within five or six days we ought to accomplish it according to the number of workmen we have on the work. Therefore we humbly ask and pray Your Honor to be pleased to defer to our prayer, being convinced that the necessity of having at the same time at this settlement the oxen necessary, and peons sufficient

to work with, compels us to disturb the occupied attention of Your Honor with the justice that we ask. We declare this is not in dissimulation, and as necessary, &c.

Santa Maria de Dona Ana, January 9, 1844.

JOSÉ MA. COSTALES.

(And 51 others named.)

TOWN OF EL PASO, *January* 10, 1844.

This petition will be attached to the expediente relative to the colonization of Da. Ana, and notices will be posted for the information of the public and of those interested, announcing that
309 upon the 15th or 16th instant I shall commence my march to execute the distribution of lands conformably to what is ordered by the superior government of the department.

REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

TOWN OF EL PASO, *January* 16, 1844.

There being already at the bend of Doña Ana some citizens of those who have applied to settle the same, and they requesting that the adjudgment conceded them of the lands be executed as soon as possible, what is provided for by the superior government of the department in the foregoing regulation annexed to the expediente on the subject will be executed in all its parts by me, Antonio Rey, prefect of the district of El Paso.

REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

BEND OF DOÑA ANA, *January* 19, 1844.

Under the order of the superior government to make the distribution of lands which has been conceded to the new settlers at this place, the parties interested will be cited to appear as adjoining settlers on this day, when the measurements should be commenced.

REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

Plan Showing the Extent of the Area Embracing the Lots of Land which Have Been Distributed to the New Settlers of the Bend of Doña Ana.

(Here follows plat.)

A seal, seal 5, half a real, years one thousand eight hundred and forty-four, and one thousand eight hundred and forty-five.

310 *List of the Lots of Land Distributed to the Settlers of the Bend of Dona Ana by the Prefect Antonio Rey, with the Number of Lots that Each One Has.*

(Here follows list of lots distributed and names of allottees.)

Dona Ana, January 24, 1844.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

Appointment of Justice of the Peace.

Exercising the power which the law of 20th of March, 1837, and the superior government in the regulation by it approved July 31, 1840, for colonizing this point, confers upon me, I have appointed you justice of the peace for this new settlement, to the end that you immediately take possession of that office. You will present yourself at once to take the proper oath.

God and liberty. Dona Ana, January 25, 1844.

ANTONIO REY.

Messrs. Pablo Melendres and Jose Ma. Costales, justices of the peace.

A copy. El Paso, January 25, 1844.

JOSE DOLORES MADRID, *Secretary.* [A RUBRIC.]

To the justices of the peace and people of this place:

Charged by the most excellent governor of the department with the establishment and regulation of this new settlement, I do make known to you that having determined that the distribution of lands be made to the new settlers of this extensive bend—a place very fertile, and from its size advantageous for agriculture—I have laid off therein 69 lots of land, 47 of 780½ varas long and the same in width, for those who are the heads of families; and for those
311 who are not, 22 of the same length and 390¼ varas in width, marking with stakes where the owners should put the corresponding landmarks which the laws prescribe for the same, will be this day distributed in conformity with what I am directed to do, adverting that the former commence on the north side from a short distance this side of a branchy cottonwood distant 790 varas from where the houses now are in the space between them and the mouth of the acequia, and on the south they extend from the further side of Las Cruces, about thirty varas this side of the little cottonwood. It is impossible that these measures be perfectly exact, as well owing to the mountains and elevations of so great extent as to the want of instruments; but I believe sufficiently so that the number of varas corresponding to each one and the point whence the measures commence may be known. At the mouth of the acequia, although up to this time danger does not threaten, a sufficient palisade is necessary for the greater protection which can be made opportunely, and from there the acequia should be opened with the width of three square varas, so that sufficient water may enter to irrigate the fields upon the right, and those upon the left, without prejudice to that which should go to the town, for which purpose the overseer for the main acequia will be in the intermediate space from the barracks to the mouth of the acequia at the point most suitable that he may direct the water advantageously. To form the settlement I have selected an elevation which, although it does not quite meet my wish, from its circumstances seems at present to be the place most suitable. It possesses a fair view, overlooks a large portion of the fields, and I promise myself that its inhabitants will always enjoy

the best health. Every enterprise at the beginning, however small, presents great difficulties, but energetic and industrious men overcome them all with time and perseverance, when they are persuaded that in the end they will see realized the fruits of their efforts entering into the enjoyment of those comforts which render life happy, and which those who having no goods or property see themselves enslaved in order to earn the sustenance necessary to live, cannot enjoy. The lands distributed are fertile in their nature, and susceptible of great advantages in agriculture. The supreme government has granted them with a liberality which you yourselves have admitted, alleging that owing to poverty it will be impossible to cultivate them, and it is for you to reanimate yourselves and avail yourselves of them, scorning that hydra from which the same sacrifices have been made in all those colonies which are cities today.

New settlement of Doña Ana, January 25, 1844.

ANTONIO REY.
J. DOLORES MADRID, *Secretary.*

I, citizen Antonio Rey, prefect of the district of El Paso, in the bend of Doña Ana, on the 25th of January, 1844, having received the replies of the principal and alternate justices of the peace annexed to these proceedings, the designation of jurisdiction may be proceeded with by me, wherefore exercising the authority which the most excellent governor has conferred upon me, I designate as jurisdiction to this new settlement of Doña Ana, 2,500 varas toward the north, and the same toward the south; 1,250 toward the east, and an equal number toward the west, counting from the center of the main plaza assigned to said settlement; and in testimony whereof I sign with my secretary.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

312 In the bend of Doña Ana, upon the 25th of January, 1844, I, Antonio Rey, prefect of the district of El Paso, agreeably to what is provided in article 3 of the regulation issued for the government of this new settlement, do designate for its commons an area of 2,500 varas in length and 1,250 varas in width, measured from the center of the plaza to the principal one; and in testimony whereof I sign with my secretary.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

At Dona Ana, January 25, 1844, I Antonio Rey, prefect of the district of El Paso, in pursuance of the commission I have from the most excellent governor of the department, will proceed to the distribution of lands and lots of the settlers who apply to locate and settle at this new settlement by issuing to them the proper titles; thus I provided, ordered, and signed with my secretary.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

At the place Dona Ana, January 25, 1844, I, Antonio Rey, prefect of the district of El Paso, commissioned by the most excellent governor of the department for the formation of this town, and distribution of lands and lots to all those who may settle thereon, having to designate a site upon which to build a church, house where the parish priest may reside, and the public buildings, do designate, in accordance with article 5 of the regulation of July 31, 1840, a square of 100 varas in length and 50 in width, upon which said edifices may be erected, which square is situated in the plaza on the side looking to the south, its boundaries being toward the cardinal points, the public streets of this town. In testimony whereof I sign with my secretary.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

JUSTICE'S OFFICE OF DOÑA ANA.

By the note of your honor dated yesterday, I am informed of the appointment of justice of the peace that you have made in my person for this place; and respecting the precept of the law, notwithstanding my notorious inadequacy, I will endeavor to justify the compliment. This occasion affords me the opportunity to assure Your Honor of the considerations of my esteem.

God and liberty, Doña Ana, January 26, 1844.

PABLO MELENDRES. [A RUBRIC.]

His honor the prefect of the district of the town of El Paso.

OFFICE OF ALTERNATE JUSTICE OF DOÑA ANA.

By the note of your honor dated yesterday, I am informed of the appointment that you have made in my person; and respecting the precept of the law, notwithstanding my inadequacy, I shall endeavor to justify your compliment. This occasion affords me the pleasure of protesting to Your Honor assurances of my esteem.

God and liberty, Doña Ana, January 26, 1844.

JOSÉ MA. COSTALES.

His honor the prefect of the district of the town of El Paso.

At Doña Ana, 26th January, 1844, I, Antonio Rey, prefect of the district of El Paso, having discharged the commission conferred upon me by the superior government of the department for
313 the erection of the new settlement of Donna Aña, formation of the municipal government, designation of its extent or jurisdiction, and distribution of its lands and lots among the settlers that might desire them and to settle and live upon them, directed that the same be appended to the record of inhabitants which has been formed, and that a duplicate being made of all the proceedings I have executed in said establishment the same be officially transmitted to the proper justice, to the end that he filing the same, the designation of sites, jurisdiction, lands, and lots which I have made may appear in all time. This expediente being transmitted origi-

nal to the most excellent governor for his superior information. Thus I provided, ordered, and signed with my secretary.

ANTONIO REY.
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

DEPARTMENT OF CHIHUAHUA,
NEW SETTLEMENT OF DOÑA ANA.

Record of the present residents and inhabitants in this new settlement:

(Here follows 61 names of persons and their ages.)

314 ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretarg.* [A RUBRIC.]

DEPARTMENT OF CHIHUAHUA,
Jurisdiction of the Town of Dona Ana.

Statement Showing the Number of Inhabitants in this New Settlement of Doña Ana, with Distribution of Classes and Conditions of Both Sexes, Including Children.

	Men.	Women.	Boys.	Girls.
General summary of residents.....	107	59	48	47
General summary of Indians.....	0	0	0	0
Totals.....	107	59	48	47
General summary of married	44	44	....	....
General summary of widows.....	5	....	....	....
General summary of single.....	58	15	....	....
Totals.....	107	59	48	47

New settlement of Doña Ana, date as above.

ANTONIO REY. [A RUBRIC.]
J. DOLORES MADRID, *Secretary.* [A RUBRIC.]

315 PREFECTURE OF THE DISTRICT OF EL PASO DEL NORTE.

By reason of the petition which appears from page 24 to 25 of this expediente, signed by fifty-five citizens, and of the respected orders of the superior government for the purpose of endeavoring to render the settlement of Doña Ana effective as soon as possible, I found I was obliged to be at that place to make the adjudgment of lands, for which purpose I was appointed prefect of the district. Upon my arrival I caused the settlers to assemble; I informed them of the regulations upon the subject, approved by the most excellent

governor, and of the other orders for colonization. The census of the inhabitants was taken; and taking this for a basis, I proceeded to the measurement, distribution of lands and other acts which appear in the corresponding expediente which I forward to you original. There is also conceded to the new settlers the necessary water for their fields; and complying with the 20th article of the said regulations I should state that, in my humble opinion, its distribution may be made by hours, designating 36 to the larger lots and 32 to the smaller, beginning the irrigation at lots No. 1 and 69; being able afterward to make such alterations as experience may prove to be proper and just. I also deem proper to enlarge this report to state the circumstances that occurred worthy of the knowledge and attention of the superior government, and in consequence proceed to show them. Upon my appearing at Dona Ana, I was spoken to in the name of some citizens of means in this town that they might be furnished lands, they obliging themselves only to place peons to cultivate them; but I, as I did not believe myself authorized to do so, and as I have learned that the intention of many is solely to take advantage of the abundant fruits of those fertile lands, decided that that question pertained to the government, and that I ought to limit myself to reporting, as I do, for its superior determination. Upon leaving for this town I directed the justice to order that all the parties interested to whom lands had been distributed, present in due time to this prefecture the proper papers which should be filed for issuing to them their titles, but up to this time there are but six papers; and this is the reason why I do not yet forward them for the approbation of His Excellency. Finally, I have plainly observed since going to Dona Ana that the generality of the petitioners were discouraged, and that they did not justify hopes of earnestness in their applications, either on account of their poverty, or because they are not animated to carry out their undertakings. I now see my ideas already corroborated by the notice which the justice of the peace of that place has forwarded me, in which appear 31 citizens who have renounced their right, together with the corresponding families, amounting to 111 persons of all sexes and ages. That place is thereby again reduced to a very small number of inhabitants. I believe that it will not be established before they commence to receive injuries from the Apaches, and in the end will be abandoned, and perhaps we shall have to lament some calamities; all of which I state to you to the end that the most excellent governor, to whom you will please report, may be pleased to determine as may be his pleasure concerning the points embraced in this report.

God and liberty, Town of El Paso, March 17, 1844.

ANTONIO REY. [A RUBRIC.]
JOSE DOLORES MADRID, *Secretary*. [A RUBRIC.]

To the secretary of state of the department.

316 A copy faithfully and legally made by direction of the citizen-governor of the State from the documents contained

in the two original pamphlets on file among the archives of the secretary's office in my charge relative to the granting of lands made in favor of sundry citizens of the town of El Paso for settling the place called Dona Ana, ten leagues from said town, which documents commenced in the year 1840, and terminated in the year 1844.

Chihuahua, March twenty-eight, eighteen hundred and seventy-one.

[SEAL.] JUAN B. ESCUDERO, *Secretary.*

TERRITORY OF NEW MEXICO,
COUNTY OF DONNA ANA.

The foregoing is a correct translation of the original documents, filed herewith in the Spanish language, to the best of my knowledge and belief.

Sworn to and subscribed before me this 17th day of January, 1874.

Witness my hand and the seal of court, the day and year last aforesaid.

[SEAL.] DANIEL FRIETZE,
Probate Clerk of the Court of Dona Ana, New Mexico.

SURVEYOR-GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
SANTA FÉ, NEW MEXICO, *January* 31, 1874.

The foregoing translation of one hundred and five pages, having been by me carefully compared with the document in Spanish, whence it was made and found correct, is hereby adopted as the official translation.

DAV. J. MILLER, *Translator.*

(*Testimony in the Case.*)

IRINEO CASTALES, being first duly sworn, testifies as follows: I live in Dona Ana, county of Donna Ana, and Territory of New Mexico; I am forty-five years of age; I know where the Doña Ana grant, which was made by the Mexican government to Doña Anna colony, is situated. It is in the present limits of the county of Donna Ana, Territory of New Mexico, and in territory which was acquired by the treaty of Guadalupe Hidalgo, from the government of Mexico. It includes within its limits the towns of Dona Ana, Las Cruces, and Tortugas. The lands granted consist of the lands of the Doña Ana bend, (El Ancon de Doña Ana). Said bend extends from the head of the Doña Ana acequia, above said town, down Rio Grande river on its eastern bank, to place on said river known as the Brazitos, where was the head of a ditch belonging to Juan Antonio Garcia, and where his grant commenced and extended south. Since the Doña Ana grant was made, the Rio Grande river in some places has changed. Where it has changed, I refer to the old river bed, (now known as such,) as the line of said grant of Doña Ana on the west. The said Rio Grande river was the

western boundary at the time the said grant was made. The said grant of Doña Ana also included the foothills, on the east of the valley lands, described for pasturing purposes. My father José Ma. Castales was one of the principal colonists of said Doña Ana
317 colony. I know the boundaries of said grant, because I have been with parties when the boundaries were established, and the said boundaries have been recognized by every one, as such, ever since. My father took an active part in the colony, and I have my knowledge of the facts I have stated by being with him when he was engaged in measuring lands on the grant, and acting for the interests of the colony. I have no interest now whatever in the said colony of Doña Ana, or the said grant of lands.

I went upon said grant with my father, and have been there ever since. The grantees, over one hundred, entered into possession of said grant of lands and have continued until now in possession of same. They and their heirs have always been considered and recognized as the legal holders and owners of the lands before described by every one as well as the authorities of the Mexican government. There are over three thousand, perhaps four thousand, inhabitants now living on and holding under said grant. The lands of said grant are non-mineral; consist of agricultural and pastoral lands solely.

YRINEO CASTALES.

Sworn to and subscribed before me this 29th day of December, 1873. Witness my hand and the seal of court, the day and year last named.

[SEAL.]

DANIEL FRIETZE,
Probate Clerk of Donna Ana County, New Mexico.

FRANCISCO RODRIGUEZ, being first duly sworn, deposes and says: I live in the town of Dona Ana, county of Donna Ana, Territory of New Mexico. My age is forty-nine years. I know the place known as the grant of Doña Ana. It is situate in the present limits of the county of Donna Ana, Territory of New Mexico. It was formerly territory belonging to the Republic of Mexico or Mexican government, and was acquired by the United States with territory acquired at the treaty of Guadalupe Hidalgo. I went to said Doña Ana grant with the colony, when quite young, and have been there ever since. The grant aforesaid was made to the land embraced in the bend of the Rio Grande, known as the bend of Doña Ana. Said bend extends from the head of the acequia of Doña Ana at the north of said grant and bend of Doña Ana, to the Brazito, at the south of said bend and grant, a distance of about twelve miles north and south, up and down said river. The Brazitos is a point on the Rio Grande del Norte at the northern limit of the grant now known as the Stevenson grant, formerly of Juan Antonio Garcia, and where the head of the acequia or ditch of said Garcia took the water from the said River Rio Grande to water lands of his said grant, that is the said Rio Grande formerly run there, but it is now changed. The Rio Grande river aforesaid, between the head of the Doña Ana

acequia, aforesaid, and the Brazitos aforesaid, as it formerly run, that is the channel known as the old river, is the boundary of said grant of Doña Ana on the west. The eastern boundary of said grant is a line commencing one league east of the head of the said acequia of Doña Ana, and thence running to a point one league east of the Brazitos aforesaid, from north to south. This line embraces foothills which were granted the said colony for purposes of pasturage.

The colonists originally numbered over one hundred. They entered into possession of said grant of lands, and cultivated said lands, and have held them without interruption (except once and awhile from Indians that were hostile) ever since. The said grantees and their heirs have been always recognized by the authorities of the government of Mexico, and every one, as the legal
318 owners and holders of the said lands. There are over three thousand five hundred persons now occupying and holding said lands by virtue of the grant of Doña Ana. Said grant was made by the authority of the government of the Republic of Mexico.

Said lands of said grant are non-mineral; they are agricultural and pastoral. I have no interest whatever now in said grant.

FRANCO. RODRIGUEZ.

Sworn to and subscribed before me this 29th day of December, 1873. Witness my hand and the seal of court, the day and year last named.

[SEAL.] DANIEL FRIETZE,
Probate Clerk of Donna Ana County, New Mexico.

GUADALUPE MIRANDA, being first duly sworn, testifies as follows: I live in El Paso, Mexico, and I am sixty-three years of age. I know the grant called Doña Ana, or the bend of Doña Ana. It is known as the colony of the bend of Doña Ana. It is situated on the east bank of the Rio Bravo del Norte, known as the Rio Grande river, from ten to fifteen leagues north of the town of El Paso, Mexico, and within the present limits of the county of Donna Ana in the Territory of New Mexico. It includes the present towns of Dona Ana, Las Cruces, and Tortugas, and is in that portion of the territory of the United States which was acquired from the Republic of Mexico by the treaty of Guadalupe Hidalgo. The said grant embraces the lands included in and known heretofore as the bend (ancon) of Doña Ana. It extends from the mouth of the present acequias of Doña Ana, Las Cruces, and Mesilla, where the water enters said acequias from said Rio Grande to the barancas (high banks) at the head of the acequia of the Brazitos, (a branch of the river.) The place Brazitos is now known as the Stevenson grant, which is the southern limit of the bend of Doña Ana grant. The head of the acequias of Doña Ana, Las Cruces, and Mesilla, is the northern limit of said grant. At this last-named point the Rio Grande makes a bend leaving the foothills on the eastern bank of said river, and bearing southwestwardly and nearing the foothills

on the western bank of said river, and continues near the western foothills of said western bank until said river passes the present town of Pichaco, and thence said river bears toward the east and southeast until it reaches the "Barancas del Brazitos" before mentioned, which place was formerly the head of the acequia of Don Juan Antonio Garcia, whose grant, now known as the Stephenson grant, commenced at this point, and thence extended south. All the land lying between the said River Rio Grande del Norte and the foothills on the east bank of said river, between the head of said acequias of Doña Ana, Las Cruces, and Mesilla, and the Barancas del Brazito, are included in the grant of lands from the government of Mexico to the colony of Doña Ana. The easterm limits of said grant of Doña Ana are one league to the east of a line drawn along the foothills bordering on the east of said bend of Doña Ana, running from north in a southerly direction, from a point opposite and east of the said northern limit of said grant, to a like point opposite and east of the southern limit as before stated, (one league.) This league of land bordering on the east of said bend of Doña Ana, (one league deep,) was for use of colony for grazing purposes, and the lands bordering on the said river, bottom lands, were for agricultural purposes.

The first petition by colonists to settle the bend of Doña Ana, above described, was made to the government of Mexico in the year 1839. The colony was settled under great difficulties, and existed for a time under the most discouraging circumstances—chief difficulty being on account of savages or hostile Indians. At one
319 time it seemed that the colony of Doña Ana would fail, but owing to the liberal grant of the Republic of Mexico to the bend of Doña Ana, a belt of land along the eastern bank of said river, a distance of about twelve miles, the colonists who had abandoned the place again returned with others, and have continued in possession of said grant ever since.

I know the limits of said grant, because I, in company with the prefect, Antonio Rey, prefect of El Paso, in the State of Chihuahua, and Don Pablo Melendrez, measured off lands to the colonists. The colonists petitioned the government of Mexico for the tract of land known as the bend of Doña Ana. Their petition was granted said colonists of Doña Ana, and the lands embraced in the limits above described measured off to them, all in accordance with law. I have reference to the course of the River Rio Grande at the time said grant was made. At the mouth of the acequias, at north limits of said grant, the river is the same; but below it has changed, and the old river bed is the boundary of said grant on the west.

In relation to said grant of Doña Ana, in the year 1846 I was prefect of El Paso, and by virtue of authority I had as such officer from the government of Mexico, I wrote the following to the justice of the peace at Dona Ana:

Sr. justice of peace, Dona Ana:

"This prefecture being so much occupied by the incursions of the savages, and the personal services of myself being required in this

town as of vital importance, I am not permitted to come to your town in person to the distribution of lands to your citizens, for which reason I send herewith to you the 'expediente' in the matter, in order that you may make the distribution of the lands and titles to them to the residents as well as those who shall come upon said colony within the time prescribed by the regulation, concluding that you will not make any distribution until you obtain permission, if it should be necessary, of the supreme government.

"El Paso, January 22, 1846."

This letter had reference more particularly to the giving of title to the several colonists upon said grant. My acts, and those of the justice of the peace, were duly approved by the government of Mexico, the grantees of said grant of Doña Ana entered into possession of the lands before described, and they and their heirs have continually been in possession of the same, and have been recognized as the legal owners and holders of the said grant of lands by every one since said grant was made till now. I know much about said grant, because I was an officer of the general government, acting as its agent (the government of Mexico) touching said grant, and it was deemed very important by the said government of Mexico to establish this said colony. I have examined the documents here, (document hereto annexed,) certified as copies of papers pertaining to the said Doña Ana grant, in the archives of secretary's office, State of Chihuahua, by Juan B. Escudero, secretary. Said copies are correct as far as I know. Many of the originals I have seen. The acts of the justices in making measurements in particular to individual colonists on said grant do not appear in them. They ought to be with the archives of the grantees. The two justices who knew much about the matter are dead—Don Pablo Malendrez and José Ma. Castales. The former issued the titles. The land measured off included what I have before stated. There are now upon said grant holding under it over three thousand five hun-
320 dred inhabitants. The lands embraced in the limits of said Doña Ana grant are non-mineral. I have no interest whatever in said grant of Doña Ana.

GUADALUPE MIRANDA.

Sworn to and subscribed before me, this 29th day of December, A. D. 1873. Witness my hand and the seal of court, the day and year last named.

[SEAL.] DANIEL FRIETZE,
Probate Clerk of Donna Ana County, New Mexico.

(*Surveyor General's Decision.*)

Doña Ana Bend grant.

Opinion.

This claim for lands by the people of Dona Ana comes before me for examination under the eighth article of the treaty of Guadalupe

Hidalgo and the eighth section of the act of Congress of July 22, 1854, establishing this office.

The record shows the establishment of the colony by legal authority of the Republic of Mexico in 1839, and that the colonists and their heirs and legal representatives have ever since claimed or occupied the lands, and that they have never been disturbed in possession except by hostile Indians.

I believe the title to the lands is perfect in said claimants, and respectfully recommend that the same be confirmed to them, the said colonists and their legal representatives, according to the boundaries described in the testimony of Guadalupe Miranda.

I transmit triplicate copies of the entire record.

JAMES K. PROUDFIT,
United States Surveyor General.

United States surveyor general's office, Santa Fé, New Mexico, March 31, 1874.

(*Authentication of Transcript.*)

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *April* 4, 1874.

The foregoing is a correct transcript of the papers on file in this office in private land claim reported as No. 85, in the name of the colony of Doña Ana bend.

JAMES K. PROUDFIT,
United States Surveyor General.

321 DEFENDANTS' EXHIBIT MESILLA COLONY GRANT, REPORTED No. 86.

322 *Petition of Claimants.*

TERRITORY OF NEW MEXICO, }
County of Donna Ana. }

To the surveyor general of the Territory of New Mexico:

Your petitioners, the inhabitants of the civil colony of Mesilla, in the county of Donna Ana, would respectfully state that, on the 4th day of August, in the year 1853, one Guadalupe Miranda,
323 commissioner general for the transportation of Mexican families into national territory, in conformity to the laws and regulations of the government of Mexico, made a grant of land to certain Mexican families, known as the civil colony of Mesilla, then being a portion of the Republic of Mexico, but now being within the county of Donna Ana, in the Territory of New Mexico, which said grant was made in fee to the inhabitants of said colony, and was duly taken possession of by said grantees in accordance with the form of law then in force, and has ever since that time been in the quiet and peaceable possession of said grantees, their heirs and assigns, without any adverse claim of any kind from any source whatever.

Your petitioners further state that the towns of La Mesilla and El Picacho are situated on said grant, and the residence and farms of your petitioners, who have inherited the same from the original grantees or acquired them by purchase.

Your petitioners further state that they, your petitioners, number more than one thousand persons, all of whom live upon said grant, and hold the same either by purchase or inheritance from the original grantees. And your petitioners further state that they are unable to state the number of acres contained within the boundaries of said grant, as no survey of the same has ever been made, but the boundaries mentioned in said grant are well known and easily identified.

Wherefore your petitioners, the inhabitants of said civil colony or grant, with a view that these grants may be confirmed by the Congress of the United States, herewith present for your consideration a copy of said grant in the Spanish language, marked Exhibit A, together with a translation of the same; also contain rules or regulations, marked Exhibit B; also a printed copy of a decree of the Mexican government, marked Exhibit C; also a paper marked B B; also the sworn testimony of Guadalupe Miranda, Vicente Lucero, Martin Trujillo, and Eugeneo Moreno; they also refer to the diagram (copy appended) filed with the papers this day, in the grant known as the Doña Ana bend.

The inhabitants of the civil colony of Mesilla, by

JNO. D. BAIL,
Their Attorney.

(Here follows diagram marked p. 324.)

325 (Translations.)

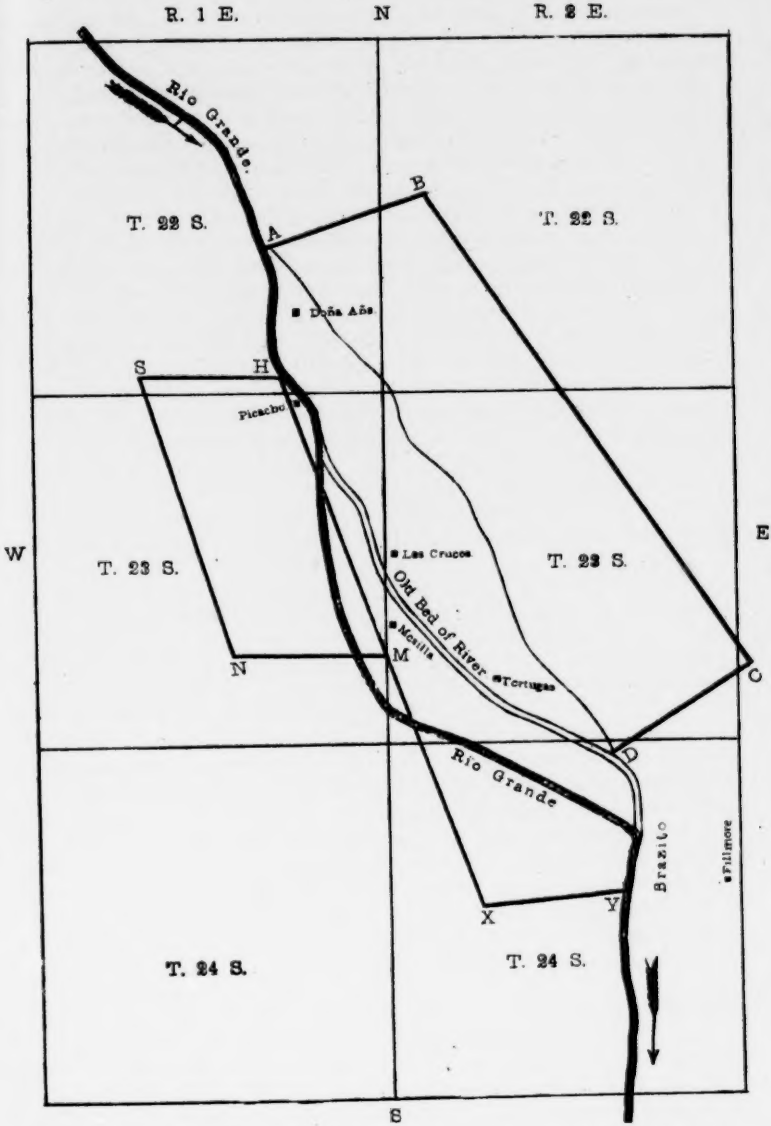
Claimants' Translation of Exhibit A.

Guadalupe Miranda, commissioner general for the transportation of Mexican families into national territories, in accordance with—

I certify that on this the fourth day of August, one thousand eight hundred and fifty-three, I arrived at the colony of La Mesilla, on the west margin of the River Bravo del Norte, (Rio Grande,) and by and in the name of the supreme of the nation and of the government of the State I have determined, assigned, and affixed the landmarks of their common as a new colony, to wit: Two leagues across the river bottom so as not to give the majority of it on the immediate bank of the river or the foothills five thousand varas, said area should contain, so as to make it square, and running north until it reaches the hills of the Pecacho mountain, and two leagues on the hills and mountains for grazing purposes, in conformity with article 2 of the ordinance of the 22d May, 1851, and by the circumstances caused by the numerous population this colony now has, the land herein granted will be proportioned to them to their advantage, and to be divided into two towns as soon as practicable; one where the town is now situated, and the other at the foot of the Pecacho mountain.

PRIVATE LAND-CLAIMS.

Copy, of Diagram referred to in the foregoing Petition.



The Sketch Shows the River as it ran up to 1865. Since then it has changed

no. 78
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Inasmuch as all the farming land is now in cultivation, that fact has caused me to grant so much farming land, being all that lies in the river bottom comprehended by the following boundaries, and the two leagues for grazing purposes, having established the line that divide- the colony of La Mesilla and that of Santo Tomas de Iturbide, on yesterday of the third (3d) day of the present month, in presence of the authorities of both colonies, viz: Don Domingo Cubero, Don José Manuel Sanchez Baca, and citizens of both colonies, to wit: Don Cesario Duran, Don Blas Duran, Don Francisco Roja, Don Balentin Maese, Don Mauricio Sanchez, and many others. The initial point (first landmark) was established (eastwardly) near an arm of the river about eight varas from a few cottonwood trees which are blazed, and near a small sand hill; from thence west on the south of La Mesilla, and north of Santo Tomas, (the boundary line having been run with a cord,) to the ruins of an old corral, known as "Las Guerras," which said line measured five thousand (5,000) varas up to the hills where a landmark was made; thence running north on the east, (this line also having been run with a cord,) following the foothills in a direct line towards Picacho mountain, on the same bank of the river to where it connects with the hills; from thence following the same direction to a small black mound, north of a small flat known as "Apache ford," and a short distance above Pecacho for the distance of nineteen thousand five hundred varas; returning and taking the first point (initial point) on the bank of the river where the line divides the colonies of Santo Tomas and this of La Mesilla, and from said small sand hill to the north on the east, following the bank of the river in a direct line in the direction of the Pecacho mountain, on the bank of said river, the same runs into the hills, and necessarily following its bank to the small black mound north of the aforesaid small flat known as the said "Apache ford," and measuring twenty thousand varas, with which said boundaries terminates the area of the said forming lands.

From this point, *i. e.*, the small black mound running toward the west, on the north, over the hills and mountains, measured five thousand varas, at the termination of said line, was estab-
326 lished by erecting a monument near the dividing line. From thence on the south on the west was measured ten thousand varas, which said line reached and run below the present site of the town of La Mesilla, at the termination of which a landmark was established on the plain; from thence to the east on the south was measured five thousand varas, which extended to the foothills, and touching upon the boundaries of the farming lands above mentioned.

The said grazing lands being granted in accordance with article four (4) of the aforementioned ordinances, having left the boundaries marked by small mounds of earth and blazed cottonwood trees, and requesting the authorities to erect of stone and cement the initial points of said boundaries, so that time would not efface the same, I do declare to the utility of the citizens of said colony of La Mesilla in common grazing, water, game, fishes, rock, trees, fruit, and other

clas-es of the products of the soil, so that none, except he be a citizen of said colony, can enjoy the privileges granted to those by law, and to those persons who in the future will identify themselves as such.

The citizens of said colony will enjoy the pasture grounds and other productions of unoccupied lands beyond the boundaries of this grant, together with the citizens of the immediate towns, until such time as the government shall dispose of the same as provided for in article 5 of said aforementioned ordinance.

Having established the boundaries as aforementioned, in the presence of the said authorities and citizens, I therefore certify to and sign this on the date aforesaid, on this common paper, as none of corresponding seal can be had, at the same time taking the required testimony necessary to guard the title to said colony.

G. M.

This is a copy taken from the original, with which it corresponds legally and faithfully.

In testimony for the guard of said colony I hereunto inscribe my name on this the 4th day of August, 1853.

GUADALUPE MIRANDA.

Fees for survey and testimony, $100.

TERRITORY OF NEW MEXICO, }
County of Donna Ana. }

The foregoing is a correct translation of the original grant, marked Exhibit A, filed herewith in the Spanish language, to the best of my knowledge and belief.

JNO. D. BAIL.

Sworn to and subscribed before me this 17th day of January, 1874. Witness my hand and the seal of court the day and year last aforesaid.

[SEAL.] DANIEL FRIETZE,
Probate Clerk of Donna Ana County, New Mexico.

[SEAL.] EXHIBIT B B. [SEAL.]

I, Citizen Luis Valdez, first judge of first instance of the Bravos district, State of Chihuahua, do certify that Cristoval Ascarate, a citizen of the United States, of the North, presented in my office an official document, the day of the date hereof, which to the letter is as follows:

327 "HEADQUARTERS OF CHIHUAHUA.

"Brigade Trias, general-in-chief, doth state to the curate of this village, the presbyter, Ramon Ortiz, the following:

"His excellency, the governor of the State, in a communication of the 11th instant, states to me as follows:

"The honorable the secretary of state, in his note of the 23d of March last, states to this government the following:

"'EXCELLENT SIR: I have communicated to his excellency the general, the depository of the supreme executive power, Your Excellency's note, number 4, of the first instant, in which you set forth the disorders caused by the conduct observed by Presbyter Ramon Ortiz, curate of the village of El Paso, and the necessity of removing him from the commission that had been conferred upon him to protect the emigration of families from New Mexico; and His Excellency being advised in the premises, as well also as of all other matters mentioned in said communication, has been pleased to empower, and he does hereby authorize, Your Excellency to appoint such person as you may deem most suitable, in lieu of the said presbyter, Ramon Ortiz, on said commission, and to inform this office thereof, to the end that it may take such steps as may be deemed expedient, in order not to defeat its object; and in order to prevent the evils and perils you lament in your said note, His Excellency trusts finally in the zeal and patriotism of Your Excellency to preserve, unalterably, good order, and the integrity of the national territory, as respects the State under your worthy command, and I transmit the same to Your Excellency, in order that you may be pleased to proceed at once to appoint the person who shall succeed Presbyter Ramon Ortiz on the commission referred to in the foregoing note; hence this government specially empowers Your Excellency to make such appointment, with the understanding that, under this date, there is forwarded to Mr. Ortis the proper communication, requiring him to render to the person Your Excellency may appoint the due account of the disbursements he may have made of the funds he has received for the purposes of the commission he has discharged. And I transcribe the same to you, informing you that, in the exercise of the supreme authority granted, and that of the authority to me granted, I have appointed Guadalupe Miranda to substitute you in appointment, which was conferred upon you, for the removal of families from New Mexico and the formation of civil colonies of the State, you being pleased to render to the said Mr. Miranda the corresponding account of the sums you may have received for the discharge of your commission, and I have the honor to insert the same for your information, hoping that you will be pleased to accept the honorable commission which I confer upon you, in consideration of the patriotism and philanthropic sentiments for which you are distinguished. You may, therefore, proceed to receive from the curate Presbyter Ramon Ortiz, the funds and all papers pertaining to the said appointment, which he held.'

"Tendering to you the assurances of my sincere esteem and high consideration.

"God and liberty, Paso del Norte, April 28, 1853.

"ANGEL TRIAS. [RUBRIC.]

"Hon. Guadalupe Miranda."

This is a copy taken literally from its original, which agrees faithfully and legally with the said official document which
328 was presented to me by the American citizen Cristoval Ascarat, taken on two pages of seal third, to which I certify, at the request of the party interested. I sign this in the village of El Paso del Norte, on the fifteenth of February, one thousand eight hundred and seventy-one, with those in attendance, to which I certify.

LUIS VALDEZ.

Attending: JESUS DÑO. MONTES.
Attending: HEMERESILDO PONCE.

[SEAL.]

Fees, without office paper, four dollars.

[RUBRIC.]

EXHIBIT A.

(*Official Translation.*)

I, Guadalupe Miranda, commissioner general for the removal of Mexican families to the national territory and the establishment of colonies, do certify that this fourth day of August, one thousand eight hundred and fifty-three, I proceeded to the Mesilla colony, on the right bank of the Rio Bravo del Norte, and in the name of the supreme powers of the nation and those of the state government, I have, for the commons of the same as a new colony, determined, designated, and placed landmarks to two leagues of agricultural land extended along the bend, as the five thousand varas which the area showed contain to square it cannot be obtained in the principal part thereof between the river and the drainings of the hills; and, ascending to the north, it narrows more until it joins the hills at the Picacho mountain, and two leagues on the mountains and plain for pasturing live stock, in accordance with article II of the regulations of the 22d of May, 1851; and in consideration of the large population this nascent colony has, and to give it more advantages and conveniences, the citizens are required and they are disposed to divide themselves into two communities as soon as possible, one of them wherever it may be selected, and the other at the Picacho mesa, as they have already under cultivation all the arable lands, a circumstance I have kept in view in granting them the extent of planting land the bend contains, which is embraced in the following measurements, and the two leagues for pasture land. Having designated yesterday, the third instant, the line that divides this colony of the Mesilla and that of Santo Tomas de Yturbide, in presence of the authorities of both, Domingo Cubero, José Manuel Sanches Baca, and the citizens and residents of both, Cesario Duran, Blas Duran, Francisco Rojas, Valentin Maese, Mauricio Sanchez, and many others, the first landmark was established on the east near an arm of the river, about eight varas distant, where there are some small marked cottonwood trees, and on a small sand hill; from thence west, south of the Mesilla and north of the Santo Tomas colony, the

line was run with the cordel to a hill in front of the ruins of a corral called the Guerras corral, making five thousand varas on the hill, and the landmark was established, continuing toward the north; on the west the measurement was made with the cordel on the slope or
329 drainings of the hills, in a direct line toward the Picacho hill on the river side, and where it touches the hills; thence continuing the measurement along the margin of the river, it reached the Peñasco Prieto hill, which is to the north of a small bend called the Apache ford, a little above the Picacho, making nineteen thousand five hundred varas. Returning to commence at the first point on the edge of the river of the colonies of Santo Tomas and this of the Mesilla was fixed where the dividing line on the north from the small sand hill; thence to the north on the east, following the bank of the river in a direct line, in the direction of the Picacho, on the margin of said river, where it touches the hills, and following the bank very close to the Peñasco Prieto which is situated to the north of the small bend called the Apache Ford bend, making twenty thousand varas, with which three measurements the area of the cultivable was determined. From this point of the Peñasco Prieto west, on the north over the hills, there were measured five thousand varas and a landmark was established on a hill near the dividing line; thence to the south on the west there were measured ten thousand varas, which reach below the present plaza of the Mesilla, the landmark was established in the plain; thence east on the south, five thousand varas were measured off, which reached to the drainings of the hills and intersected the line of the arable lands, and, in conformity with article IV of said regulation and the lines having been designated by mounds of earth and some marked trees, the authorities being directed to establish the extreme boundaries of the admeasurement by placing mounds of stone and mortar, to the end that lapse of time do not destroy them, and they may be always observed and respected as the metes and bounds of the commons. I declare the pastures, woods, water, game, fisheries, stone, fruit trees, and things the land produces to be for the common benefit of the residents (vecinos) of the Mesilla colony without any other, not a resident of said colony, having a right to enjoy the benefits granted to them by law, and to those who shall in future establish themselves there the residents of said colony, shall also have the benefit of the pastures, timber, and all other advantages of the vacant lands beyond the commons determined in common and together with the residents of the towns in the vicinity until the government shall determine to cede and alienate them, in which case they will abide by the conditions expressed in the grants as prescribed by article V of the aforesaid regulations, and having concluded said measurement in the presence of said judge and many other persons, and citizens who came and were present.

I certify and sign this on the day of the above date on this common paper, there being none of the corresponding stamp, taking the respective testimonio, which will serve as a title and security for said colony.

G. M.

This is a copy taken from its original, with which this testimonio agrees faithfully and legally, for the security of the said colony, this 4th day of August, 1853.

GUADALUPE MIRANDA.

Fees for measuring the land, original and testimonio, 100 dollars.

[RUBRIC.]

Filed for record, April 30, 1869, and recorded at folios 496, 497, 498, of Book of Deeds, No. 3, of records of Donna Ana county, New Mexico.

J. F. BENNETT, *Recorder*,
By R. H. BLAKE, *Deputy*.

330 EXHIBIT B.

Colonization Regulations Issued by the Supreme Government of the State of Chihuahua on the 22d of May, 1851.

Copy taken for the use of Daniel Trietze, Esquire, of Mesilla, N. M.

Regulations for the organization of civil colonies and all other settlements which may be formed in the State.

Article 1. The colonies shall retain this title until the honorable congress of the States shall declare them villages, cities, and so forth, according to their respective importance, and each one of them, as also all other new settlements, shall have the name given them by the commissioner, forming the same, appointed by the State government, and this commissioner will see that such name be Spanish, and be not confounded with those of other places, and shall not refer to living persons.

Art. 2. To each civil colony or new settlement the respective commissioner may grant one league for commons and pasture grounds, in conformity with the State law of October 22, 1833, in a square or extended form, according to the nature of the land and the position of the settlements in the vicinity, and on these boundaries there shall be placed landmarks, and the limits clearly defined designating plainly the four courses of the tract, and expressing in the proceedings of measurement all certain and permanent points which serve to recognize the courses with all exactness, for which purpose the four cardinal courses shall be followed, or, at least, the intermediate of these exactly should it be possible to do so.

Art. 3. Whenever there may be in the colonies or new settlements thirty male residents, over the age of twenty-one years, they shall elect, directly from among themselves, a justice of the peace, a council, composed of six members, a solicitor, and one mayordomo, in order that this council, under the supervision of the proper ayuntamient*a*, or municipal body, may manage the economical government of the colony, reporting to the prefecture of the district or the presidency of the municipality of the election, and through them the State government.

Art. 4. When the league of land to be ceded to the new settlement shall be designated and marked, its pastures, woods, waters, game, fisheries, stone, fruit trees, and other things produced shall be for the common benefit.

Art. 5. The residents shall also enjoy the timber, pastures, waters, and all other benefits arising from the public lands, there may be lying outside of the land designated to the new settlement, in common with the residents of the towns in the vicinity and contiguous, which favor and privileges shall continue only until the State shall grant and alienate the same, in which case they shall confine themselves to that which is prescribed in the grants made to the new occupants and proprietors.

Art. 6. The place which is considered most appropriate for the location of the new settlement being selected and designated, the commissioner shall see that in its establishment all the houses and other buildings which may successively be constructed, be in conformity with the site or plan first formed, in which he will see that the streets be at least twelve varas wide, that they be laid off with the cordel, and cross at right angles, which will facilitate the traffic and communication of the citizens and settlers, and contribute also to its uniformity and symmetry and beauty of the settlement,
331 and it will also serve for its better temperature, cleanliness, and health, to the benefit of those who may establish themselves there.

Art. 7. He will also see that in the center of the settlement there be a regular and well-proportioned plaza, in which shall be designated lots for the church and the curate's house, and for school and government buildings, and in convenient places other lots for a jail, barracks, stations, and so forth.

Art. 8. Having designated in the plan or site the ground that each block should occupy, and it not being possible to designate the lot sufficient for each resident settler by reason of the inequality there may exist among the families, the means and measures to be taken for the same, are left to the prudent judgment of the commissioner, the authority to concede to them the varas of ground for building lots, that according to their families, wealth, and other just considerations, he may deem necessary for one to work and improve for which purpose, and that all may have his proportionate share according to his means, he may divide among them, one-half, a fourth, or eighth, or an entire block which are the divisions most adequate to obtain the object of uniforming as far as possible the buildings of the settlement.

Art. 9. In order to prevent the complaints the voluntary assignment of lots might occasion, through preference or favor of some in respect to others, the assignment shall be executed among the first settlers by lot, as provided in law 11, title 7, Book 4, of the reco-pilation.

Art. 10. There shall be left in the circumference of the settlements a common competent for the recreation of the settlers, the exit of their stock without committing damage, and in proportion

as the same may increase in future there be sufficient land to grant them for building their houses and habitations as provided by law.

Art. 11. In like manner he shall proceed to designate and mark off the common or work-cattle meadow deemed to be sufficient for the abundant and convenient pasturage of work-cattle, and those that may be for the supply of the new settlement, endeavoring to select for this purpose lands with abundant pasture, not being of the better class for producing wheat and other grain produce, useful for the consumption and subsistence of the new settlers and their families, as provided by said laws 7 and 14, title 7, Book 4 of the reco-pilation.

Art. 42. Having concluded the setting apart of commons and the community meadows for work-cattle, the commissioner shall proceed to make a correct calculation of all the useful productive land which by means of the acequia constructed can be irrigated, and the balance not having this advantage considered proper for planting and grain-growing on the uplands, and by dividing one and the other into equal lots of two hundred and fifty varas on each side, will thereby be able to ascertain the number of lots of each class to be distributed among the new settlers and to those who may join and increase the same in future.

Art. 13. When the lots of the land most useful and nearest the town shall thus be divided, and which have the benefit of irrigation, there shall be designated and marked off eight, which shall remain applicable to the funds of the corporation, the products of which shall be administered by the mayordomo appointed by the council with the approval of the proper ayuntamiento or municipal body.

Art. 14. The first time the eight lots of the community lands shall be planted and cultivated by all, and for this purpose all the settlers and residents shall personally or with their peons work them with their oxen and cattle in an equitable manner as
332 directed by the commissioner, who shall distribute the work so that all will participate equally therein, without exception of any settler nor resident, with the understanding that this operation shall be limited to the first cultivation, planting, and gathering of crops, with the products of which the future working shall be paid; the net proceeds remaining to the funds of the corporation to be applied to public use as the law provides these funds shall be applied.

Art. 15. The eight lots of irrigable land having been assigned to the corporation of the new settlement, and designated by landmarks, the remainder there may be useful in the district, either subject to irrigation or upland, shall remain for the benefit of the settlers, to whom shall be assigned and granted as they shall establish themselves thereon; and, it being impossible to give a fixed rule for the same in order to divide, and grant the same to each settler, it is left to the prudent discretion of the commissioner the power to regulate and grant those he may deem sufficient for the support of the family of each one, keeping in view the respective laws and that of the State of April 11, 1850, the number of individuals composing each family, those among them that are able to work and labor, the

farming implements and other utensils each one may have to commence with, and finally his respective application, it being just that he who applies himself should be awarded with a greater number of lots than those who through indolence or want of application neglect to cultivate those assigned him, under which consideration the first distribution shall be made among the actual settlers, not to exceed three lots, which amount may be conceded to each one, leaving the remainder to be distributed to those who may successively join the new settlement. To the children of families when they marry shall pass to the class of citizens or to that of settlers, who by the industry and application observed by them in the cultivation of the first lots to them distributed are worthy of having an increase of others, which shall in no case exceed an equal number to that that may have been made to them in the first distribution.

Art. 16. It being very convenient for the settlers that the number of lots designated to them should be united and contiguous, one to the other, in order that in this mode they can better attend to their cultivation, without the annoyances occasioned by the distance from one piece of land to another, the commissioner will endeavor to bear in mind this consideration in order to give them as far as possible the benefit of the lands being adjoining, or at least at as convenient a distance as practicable between the lands assigned them; and in order to avoid complaints that might result on account of the better quality of land in respect to others, the same being divided in the form as directed, he shall endeavor to execute the first assignment by lot among the settlers according to and as is provided for that of lots in article nine of this instruction.

Art. 17. The commissioner under whose charge the new settlement might be and the distribution of lands and lots, shall form a book or pamphlet in which the original proceedings of distribution shall be recorded, which shall be preserved among the archives of the ayuntamiento, or respective municipal body, and in conformity therewith he shall give to each settler a testimonio or certificate of his distributive share, expressing clearly and distinctly the quantity and limits of building lots, and pieces of land which they shall assign him, which document shall serve him, his children, and descendants, as a title of possession of the same, advising them that for this purpose they should preserve it, and if they should
333 by any involuntary accident lose it, they may apply to the commissioner or the ayuntamiento or municipal body — another according to the proceeding; for this purpose they shall remain in the archives.

Art. 18. As well in the original proceedings of distribution as in the documents of title of preference that shall be given to the settlers, the commissioner shall set forth that the lots and lands distributed and granted them in the name of the State is in fee-simple forever for himself, his children and descendants, with the express condition that they shall keep arms and horses and be ready to defend the country against the insults of the enemies that may attack it, and march against them whenever commanded to do so; that they shall cultivate the soil and keep their houses and live with their

families in the new settlement for the term of four years at least; that during this time they shall not alienate, hypothecate, nor place any incumbrances on the land and lots that may have been assigned them, although it should be done for charitable purposes; that within the precise term of two years they shall have cultivated and worked the lands that may have been granted them, and at least shall have commenced building the houses on the lots assigned them. These conditions having been complied with, and having resided for four years in their houses with their families in the new settlements, they shall acquire true dominion of the lands and lots assigned them, and of the houses and buildings that they may have constructed thereon, and from that time forward shall have power to sell and use them at their free will as their own individual property as provided by law 1, title 12, Book 4 of the recompilation and that of the State of May 1, 1851, it being understood that in no case shall they have the power to sell or alienate them to a church, monastery, an ecclesiastical person, community, nor to others called mortmain, as provided by law 10 of the same title and book, under the penalty to the person violating the same of forfeiting the land and buildings, and in such case they may be divided out among others; and finally, that at the end of three months after the grant and distribution shall have been made, it shall be their duty to take possession of the lots and lands assigned them and designate all the metes and bounds thereof, set out fruit trees or others that may be useful for the supply of the settlement, whereby the district will enjoy a good and healthy condition, and that they may avail themselves of the fruit, wood, and timber, produced for domestic uses and for agricultural implements, that they indispensably need, as provided by law 11 of said title and book.

Art. 19. The advantage of irrigation being the principal means of fertilizing the lands and most conducive to the progress of the settlement, the commissioner shall take particular care in the distribution of the waters, so that all the irrigable land may participate therein, in order to secure crops; for which purpose, availing themselves of skillful and able men to divide the territory in sections or possessions, designating to each one an acequia to be taken out from the principal acequia, to contain the quantity of water that may be deemed sufficient for irrigation, and during the remainder of the year they require it, by which means each settler will know the acequia with which he should irrigate his lands, and he cannot nor shall he have the privilege of taking the water of another district nor in greater quantity than his acequia will hold, for which purpose, and that of preventing the increase in prejudice to the owners of land above or below, the distributor of water shall construct in the acequia madre flood-gates of lime and stone, at the expense of the said settlers, through which the proper quantity of water can pass.

Art. 20. In order that these may enjoy with equity and
334 justice the benefit of the waters in proportion to the lands they have respectively planted, the municipal body shall appoint, annually, an overseer of irrigation, whose duty it shall be to

distribute among the owners of land embraced within the district, or lands to be irrigated therewith, in proportion to the necessity they have for this benefit, designating by list which he shall make, the hours of the day or night that each owner shall irrigate his fields.

Art. 21. The repairs and cleaning that the acequia may require for its preservation shall be done at the cost of the vicinage, at such times as the commissioner and ayuntamiento may fix, each resident assisting with his presence and personal labor therein, or in default thereof, with the sum which by an equitable division or *pro rata* he shall determine to be paid and satisfied by peons, and as respects the repairs and cleaning by the distributors and acequias designed for irrigating the districts or sections, into which the lands shall be divided, shall be under the charge of the farmers or owners whose lands and possessions are irrigated by them, among whom the cost incurred shall be divided by *pro rata* according to the number of the lots of land each one may possess at that place or possession, it pertaining to the municipal body with the advice of the commissioner to determine the time which without prejudice to the fields said repairs and cleaning may be done.

Art. 22. To prevent the damages and injuries that, through neglect of the owner, horned cattle, sheep, and goats may do to the fields, the council shall appoint, annually, two field guards, one to discharge his duties by day, and the other by night, and, as public officers, they shall take an oath as such before the justice to well and faithfully discharge the duties of their office, whose acts shall be accredited, unless there be produced against them sufficient proof to establish the contrary, and both shall be obliged to watch day and night and see that stock do not cause any damages to the fields of the vicinage and take those they may find doing so, which they shall drive to the corral that shall be made for this purpose, and called the council's corral, and report and give notice thereof immediately to the justice, to the end that under their affidavit he may proceed summarily and executively to examine and assess the damages they may have caused, and compel the owner of the stock so taken to pay and satisfy the owner of the fields who has been injured.

Art. 23. When the colony or new settlement shall have a sufficient number of inhabitants to entitle it to its own ayuntamiento or municipal body, they shall adopt their municipal ordinances and receive their archives with a correct inventory, for which purpose they shall be kept from the beginning separate and with the greatest clearness, the documents pertaining to them, in the archives of the ayuntamiento or municipal body to which they belong.

Art. 25. Although the land granted should appear limited by law for common pasture ground for the work-cattle of the new settlement, it should be observed that new settlers may acquire beyond them other private lands according to said laws and others of the State, and it is more important to the State the multiplication of towns of sufficient vicinage and fitness for progress than the assemblage of many settlers in one place. Therefore, if many should as-

semble in one colony or new settlement, that respective commissioner will consult with the State government as to the propriety of dividing them into several settlements, for which designation, settlement, and formation, in addition to the rules expressed, there shall be observed those of the State law of November 18, 1833.

335 Therefore, it is ordered to be printed, published, circulated, and obeyed in all its parts.

Government house of the State of Chihuahua, May 22, 1851.

JUAN N. DE URQUIDE, *Governor.*

AMADO DE LA VEGA, *First Officer.*

I omitted article 24, but it only directs that the commissioner's book of record shall be rubricked on the first and last pages by the secretary of the State government. This was done through a slight oversight and being in a hurry.

Los Amoles, El Refugio, La Union, April, Sunday, 16, 1871.

(The Press, Chihuahua, May 24, 1851.)

New Settlements.

The curate of El Paso, Ramon Ortiz, commissioner of the general State government, to aid the emigration from New Mexico, has come to this city to regulate with the State government some points of the greatest interest for the discharge of the duties of his commission, and in consequence also, of other arrangements, there have been issued regulations for the civil colonies and new settlements, which we publish in this number; our readers will see that at the point situated at the place expressed in the act, (which we also publish today,) and the village of El Paso, are formed and are being formed the important settlements called, up to this time, by the name of the Mesilla and Los Amoles and El Paso, the Real, Senecu, Yesleta, Soccorro, and San Elceario, there nave also been formed the settlements of the military colony of San Joaquin and the civil ones of Guadalupe and San Ygnacio, &c.

REPUBLIC OF MEXICO,
Political Prefect's Office of the Bravos District.

Be it remembered that, on the 24th day of April, in the year of our Lord one thousand eight hundred and fifty-one, the commissioners and surveyors on the part of Mexico and the United States, to establish the dividing line between both Republics, in conformity with the treaty of peace, signed in the city of Guadalupe Hidalgo, on the 2d day of February, 1848, and exchanged in that of Queretaro, on the 30th of May of the same year, fully satisfied with the observations made and the results obtained by the chief astronomer of both commissions, fixed this point on the right bank of the Rio Bravo or Grande del Norte, at (32, 22) thirty-two degrees, twenty-two minutes of north latitude, which, in accordance with the provisions of article V of said treaty, is "the point at which said river (Bravo or Grande del Norte) intersects the southern line of New

Mexico," it being understood that the distance from this point from which the river now runs, in the direction of the same parallel, is (219^{m}.4) two hundred and nineteen and four-tenth meters, consequently to the east of said point. For the greater solemnity of this act, there were present as witnesses, on the part of Mexico, Juan José Sanchez, political chief of the Bravos district of the State of Chihuahua, as the chief authority of this place, and on behalf of the United States, Brevet Captain Abraham Buford, commander of Company H of the First Dragoons of the United States Army, and Colonel Charles F. Tappin, aid-de-camp to His Excellency James S. Calhoun, governor of the Territory of New Mexico.

336 Given in duplicate in Spanish and English, and sealed at the place designated, &c.

It is a copy of the testimonio transmitted to this prefecture.

Paso, May 1, 1851.

JUAN MARIA PONCE DE LEON.

FAUSTIN MONTES, *Secretary.*

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
SANTA FÉ, NEW MEXICO, *February* 10, 1874.

The foregoing, marked, respectively, Exhibit B B, Exhibit A, official translation, and Exhibit B, are correct translations of their originals in Spanish, on file in this office among the papers in the private land-claim in the name of the Mesilla colony.

DAV. J. MILLER, *Translator.*

EXHIBIT C.

DEPARTMENT OF HOME AND FOREIGN RELATIONS.

His Excellency the President of the Republic has addressed the following decree to me:

José Joaquin de Herrera, general of division and constitutional president of the United Mexican States, to all the inhabitants of the Republic: Know ye, that in exercise of the power conferred on me by the 2d section of article 110 of the constitution, in order to carry out article 22d of the law of the 14th June last, which created a fund for the transportation of such Mexican families as might desire to emigrate from the territory lost by the treaty of peace of Guadalupe Hidalgo, after having consulted with various persons acquainted with the local circumstances attending the territory referred to, and having heard the report of a commission appointed with this sole object, I have, in accordance with its recommendations, determined to decree as follows:

Article 1. All those Mexicans who, at the conclusion of peace, were in the territory which, by the treaty of Guadalupe Hidalgo, remained in possession of the United States of the North, and who may desire to locate upon that of the Republic, shall be conveyed to the latter at the public expense and in the manner prescribed in the following articles.

Art. 2. All persons who may be in the case mentioned will notify the consul or agent of the Republic that may be nearest at hand, or the commissioner or the agents of the commissioner that may be appointed, setting forth their names, ages, residences, and occupations, and if they have families the number of persons composing the same, with the same particulars in regard to each individual thereof.

Art. 3. The government will appoint three individuals to proceed as commissioners, one to New Mexico, another to Upper California, and another to Matamoras, in the State of Tamaulipas, charged with the transportation of the Mexican families mentioned in article 1.

Art. 4. These commissioners, in view of the petitions they may receive, direct or through the consuls, and in view of other proceedings, all of which they shall execute with the utmost expedition, shall determine the route of the families desiring to emigrate, and shall have charge of their transportation to the point of destination.

337 Art. 5. The families from New Mexico will proceed to Chihuahua, those from the left side of the Bravo to the State of Tamaulipas, Coahuila, or Nuevo Leon, and those from Upper California to Lower California or the State of Sonora, to which end the respective commissioners will have an understanding with the governors of these States and with the principal local authority of California, so that they may designate the land to be set apart for the establishment of colonies.

Art. 6. Those Mexicans who may emigrate under this decree shall enjoy the right of preference to claim all the privileges that the laws establish or may establish in favor of foreign colonists, beside the benefits herein specially extended to them. They shall also be received as a privileged class in the military colonies established by the law of the 20th of July last.

Art. 7. The governors of the States of Chihuahua, Coahuila, Nuevo Leon, Tamaulipas, and Sonora, and the principal political authority of Lower California, will make regulations, in so far as to them may belong, for the organization of the civil colonies to be founded by the emigrants, and will prescribe such measures as they may deem calculated to further, as much as possible, the enterprise, principally procuring by arrangement with the land-holders or by any other means whereby the emigrants may, within the States mentioned, obtain arable land as well as pastoral, whereon the owners of live stock may come and settle with their property.

Art. 8. Those emigrants who may not desire to devote themselves to agriculture, but to follow their profession or trade in any of the settlements, will notify the commissioner, and he the proper governor or authority thereof, so that he may inform them of the settlement to which they shall proceed and may be enabled to facilitate their location.

Art. 9. Each emigrant is free to make the journey at his own expense, in company, however, with the balance, and to reserve the whole or a portion of his quota in order that he may receive the same in farming necessaries and seeds at the place of establishing

the colony. He shall, nevertheless, be bound to notify the commissioner of the fact at the time of his enrollment in order that it may be considered when making the estimate.

Art. 10. The quota of the apportionment for the emigrants shall be twenty-five dollars each person of fourteen years of age and upwards, and twelve dollars for each person who shall not have reached that age. This sum will be received by the head of the family: I. In the amount corresponding to him and charged for transportation to the place where the colony may be established. II. In the oxen and implements delivered to him at said place. III. In seeds for his support during the first year of settlement.

Art. 11. If, on account of the distance of the place, the expenses of the journey be so considerable that they will not allow of at least the value of fifteen dollars being received in seeds and implements by each person above fourteen years of age, this sum will be completed to those individuals who go to settle in the colonies and none others.

Art. 12. Those who may not desire to settle in the colonies will receive one-half the quota prescribed in the terms agreed upon with the respective commissioners, who, should the parties not make the journey according as agreed, will not deliver to them the quota, unless satisfied that they have actually removed to the territory of the Republic.

Art. 13. The commissioners, as well as the governors of the States, will take such measures as to them may seem best to satisfy
338 themselves that the emigrants are such as contemplated by article 1 of this decree, and to prevent any of them from going now from the Mexican to the ceded territory, with the intention of enjoying thereafter the benefits of this decree, from which they shall be debarred as soon as the fraud is discovered. They shall also take care that criminals subject to trial or convicted of grave offenses do not come into the colonies.

Art. 14. The commissioners will issue to each person or family of those going to emigrate a ticket for the amount of the sum of quotas of the members, specifying in their ticket whether the expenses of the journey are borne by the party, or whether received from the commissioner, and whether they go with the intention of forming a colony, or the object of following some profession, or go to any other section of the Republic; and they will keep a minute account of the number, value, and contents of the tickets issued, to form from them the estimate of freight, provision, oxen, seed, and implements.

Art. 15. The said estimates being made, the commissioners, on their own responsibility, will themselves, or through their respective agents, make contracts, observing the utmost economy possible, for the means of transportation, provisions necessary for consumption during the journey, and for seed and implements, to be delivered to them at the place of their destination. These contracts will be executed in duplicate, one of which shall remain on file in the Mexican consulate.

Art. 16. The expenses of freighting seeds and implements, driving oxen, and generally all those expenses that cannot be calculated

with exactness before the distribution, will be charged in account under its proper head, in order that these expenses may be charged to the emigrant at prime cost. Also, a memorandum in detail will be furnished the commissioners, as expenses of the enterprise, such extraordinary expenditures as they may have to make, and which it may not be possible to estimate for at the proper time, so that they may be charged in the general account.

Art. 17. For the punctual payment of the contracts the treasury department will deposit the different funds at such places as in its judgment may be proper, and in the most proper mode to insure that those funds will not be diverted from their object; and the officers or the persons designated will pay at three days' sight the drafts drawn by the commissioner; will keep an account of the distribution, and at the conclusion will sign the general account of the commissioner. The drafts must bear the approval of the Mexican consuls or vice-consuls, so soon as they are established at these points.

Art. 18. According as the emigrant may from time to time receive what he requires, he will be charged therewith on his ticket, until the sum called for therein is supplied, when he will sign a receipt and deliver the same to the commissioner for the settlement of the account of the latter. In the liquidation and signing of the receipt, the authority designated by the governor of the State into whose territory the emigrant shall have come will supervise in the premises.

Art. 19. The general account of the commissioners will be presented to the national government with the entries authorized by law, supported by the respective tickets of the emigrants' vouchers, and bearing the approval of the governors of the respective States, and when allowed, the same will be published in the newspapers. In Lower California, the first civil authority will act for the governor.

Art. 20. The commissioners for New Mexico and California will each receive two thousand dollars for the expenses of the journey, whatever be the period their commission may continue; and,
339 further, one dollar for every man more than fourteen years of age that may emigrate, and fifty cents for other persons. The commissioner to Matamoras will receive one thousand dollars for expenses of the journey, and at the same rate for individuals as prescribed for the others. The commissioners will enter into such bond as the treasury department shall deem proper.

Art. 21. If the sum designated for the transportation should not be sufficient for the conveyance of all the families enrolled, the commissioners will immediately prepare the proper estimate and transmit the same to the national government, so that provision may be made at once to convey such families as could not come with the means now provided for the purpose.

Art. 22. Any doubts the commissioners may encounter in the discharge of their commission may be obviated by them by giving information thereof to and having an agreement with the governors of the respective States, or the first civil authority of the territory

of Lower California, should they arise in that territory; reporting, nevertheless, the state of their labors to the national government and to the governors of the respective States, with the greatest possible frequency.

Art. 23. The military and employés now in the ceded territory, and who during the war may not have forfeited their positions by infractions of the laws of the Republic, and who may desire to emigrate, will receive, besides the quota established herein, such sums as, on account of their salaries, the proper department may think proper to allow them, and those sums will be charged against the ordinary fund out of which said salaries are to be paid. The commissioners and governors will report their applications.

Art. 24. As well the agents of the general government as the authorities and functionaries of the States, will afford to the commissioners their protection, in order that these may meet with the best success in the discharge of their commission.

I do, therefore, order that this be printed, published, and circulated, and receive due compliance.

Palace of the general government at Mexico, 19th August, 1848.

JOSÉ JOAQUIN DE HERRERA.

To Don Mariano Otero.

And I communicate the same to you for your information and the proper purposes.

God and liberty.

Mexico, August 19th, 1848.

OTERO.

To the commissioner to the Territory of New Mexico, cura of El Paso, Ramon Ortiz, State of Chihuahua.

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
SANTA FÉ, NEW MEXICO, *February* 10, 1874.

The foregoing is a correct translation of the original printed paper, in Spanish, marked Exhibit C, on file in this office, appended to the deposition of Guadalupe Miranda, of December 29, 1873.

DAV. J. MILLER, *Translator.*

340 *Testimony of Witnesses.*

VICENTE LUCERO, being first duly sworn, testifies os follows:

I live in La Mesilla, county of Donna Ana, Territory of New Mexico. I am well acquainted with Guadalupe Miranda. He lived in El Paso in the summer of 1853. He was at that time commissioner of immigration under authority from the general government of Republic of Mexico and State of Chihuahua. He was commissioner of immigration, and as such commissioner under the laws of the general government of Mexico and the State of Chihuahua, he had power and authority to establish colonies and to make to them grants of lands. I know he was commissioner, because I have seen

the authority appointing him the successor of Cura Ramon Ortiz, as commissioner, and he acted in the capacity of commissioner, and was recognized as a legal commissioner for the purpose of establishing colonies and granting lands to them in the places where established. He acted as such publicly. I know the place called the civil colony of Mesilla, or the Mesilla grant. It is situated on the west bank of the old bed of the Rio Grande, where the River Rio Grande ran when this grant of lands was made. The northern limit of the said grant of lands is at a place known as Apache ford and along a line running thence west to a black hill near and above the town of the Picacho, thence running southerly along the hills bordering the western valley of the Rio Grande nineteen thousand varas to a monument, thence easterly to said old bed of the Rio Grande. The town of Mesilla is about one thousand four hundred varas southwardly from said Apache ford and black hill. Said grant lands embraced in the present limits of the county of Donna Ana and within that portion of the United States known as the Gadsden purchase.

On the 4th day of August, 1853, said Guadalupe Miranda, as commissioner aforesaid, and in accordance with laws aforesaid, made to said colony of La Mesilla a grant of lands as above described under the emigration laws and regulations of Mexico. The people of the colony aforesaid immediately entered into possession under said grant, as many of them were already upon the lands, and have ever since continued in possession of said lands by virtue of said grant to them. There were about one thousand five hundred persons in the colony aforesaid.

This paper (grant paper here shown witness) is the document given to the Mesilla colony, and in which the lands described are the lands granted, and same as I have been testifying about. I know signature of Guadalupe Miranda. The signature affixed to this document is genuine. This grant has always been respected by the authorities of Republic of Mexico and State of Chihuahua as a genuine and legitimate grant of lands under the laws thereof, and the said grantees and their heirs and assigns have always since the date of said grant been considered and respected as the legitimate owners and holders of said lands, and as such been respected by every one. The lands above described are non-mineral—are exclusively agricultural and pastoral lands.

At present the number of persons occupying said grant and holding under same is about fifteen hundred. There are two towns on said grant, namely, Mesilla and Picacho. I have no interest in said grant whatever.

VICENTE LUCERO.

Sworn to and subscribed before me this 22d day of December, 1873.

Witness my hand and the seal of court the day and year last named.

[SEAL.] DANIEL FRIETZE,

Probate Clerk of Donna Ana County, New Mexico.

341 EUGENIO MORENO, being first duly sworn, testifies as follows:

I live in the town of La Mesa, in the county of Donna Ana, Territory of New Mexico. I am forty-three years old. I know Gaudalupe Miranda. I knew him in the summer of 1853. At that time he was living at El Paso, in the State of Chihuahua, Republic of Mexico. He was at that time commissioner of immigration under authority from the general government of Mexico. I know this because I was at El Paso when the order came appointing Guadalupe Miranda as successor of Cura Ramon Ortiz, and saw him turn over the said office of commissioner to said Gaudalupe Miranda, who immediately entered upon his duties as such commissioner. He had authority by virtue of his commission to establish colonies of immigrants under the laws and regulations of the Republic of Mexico, and the State of Chihuahua, in said Republic, and under same to make grants of lands to them—the colonies—in the places where established. Said Guadalupe acted as commissioner aforesaid publicly, and he was always recognized up to date of the Gadsden purchase as a legally appointed commissioner by the Republic of Mexico, and his acts as such recognized as legal and binding. As commissioner aforesaid, in the summer of 1853 he established the colony known as the colony of Mesilla, which was a civil colony established under the laws of Mexico as aforesaid, and made a grant of lands to said colony. I was one of the parties named to assist in measuring the boundaries of the grant of land. I assisted, and accompanied the party measuring the Mesilla grant while the eastern boundary was fixed; this was the Rio Grande river, or where the said river ran at that time. The old river bed now is the eastern boundary of said grant, commencing at what is known as Apache ford, above the town of Picacho, and thence running down said river bed (old river bed) to a point above the town of Santo Tomas; thence westwardly to the top of the hills on west bank of the Rio Grande, and thence northwardly along said hills to a hill known as "Cerro prito," and thence eastwardly to the place of beginning. Said described tract of land lies in the present limits of Donna Ana county, Territory of New Mexico, and in that portion of the United States known as the Gadsden purchase. The people of said colony immediately entered upon said lands, and into possession thereof, and have continually been in possession thereof ever since. There were about one thousand persons, perhaps more, of the colony who so entered upon said lands.

This paper. (The grant known as Mesilla Grant papers here shown witness.) I know this paper. It is the grant given by Gaudalupe Miranda to the Mesilla colony. The boundaries of the grant are same as given in this paper. I have seen a duplicate of this same paper in the archives of the colony of Mesilla. I know the signature of Guadalupe Miranda. The signature to this paper is his signature. This grant has always been respected by authorities of Mexico and Chihuahua as a legal grant, and the grantees, their heirs and assigns, have always, since the date of said grant, been respected and considered as the legal owners and holders of said

lands, by virtue of said grant, and as such been respected by every one. At present there are about fifteen hundred people occupying said grant by virtue of same. I have no interest in said grant—none whatever. The lands are non-mineral; are exclusively agricultural and pastoral.

EUGENIO MORENO.

Sworn to and subscribed before me this 22d day of December, 1873.

Witness my hand and the seal of court the day and year last named.

[SEAL.] DANIEL FRIETZE,
Probate Clerk of Donna Ana County, New Mexico.

342 MARTIN TRUPILLO, being first duly sworn, testifies as follows:

I live in La Mesilla, and am forty-five years of age; I know Guadalupe Miranda, who lived in El Paso in the year 1853, and was sometimes in Dona Ana, in this county, (county of Donna Ana.) During the year 1853 he was commissioner of immigration from New Mexico to Chihuahua for the purpose of regulating and establishing colonies of Mexicans who should move from New Mexico to the State of Chihuahua. He was the successor of Cura Ramon Ortiz, and succeeded him in all his duties. He was commissioner for the purpose of establishing colonies of immigrants and to make to them grants of lands. He was appointed such commissioner by the authority of the Mexican government. His appointment came from the governor of the State of Chihuahua, Republic of Mexico. I know that he held said commissions, because I saw them, and he discharged the duties as such commissioner publicly, under the laws and authority of the Republic of Mexico. Said Guadalupe Miranda, as commissioner aforesaid, had authority to establish colonies of emigrants, and to make such colonies grants of lands in the places said colonies might occupy. I know the place called the "civil colony of La Mesilla." It is situated on the west bank of what is now known as the "old river," (but at the time the grant was made the Rio Grande ran in this old river bed,) and extends along said river on its west bank from a point known as Apache ford, near the town of Picacho, and including said town, and from a black hill along the range of hills to a monument, nineteen thousand varas, which is the southern boundary or limits of said grant. The town of Mesilla is in said grant, and is about fourteen hundred varas from the northern boundary of said "civil colony." Said colony is in the present limits of the county of Donna Ana, and within that portion of the United States known as the "Gadsden purchase."

Guadalupe Miranda, on the 4th day of August, 1853, by direction of the governor of Chihuahua, and in accordance with laws aforesaid, made to said colony of La Mesilla a grant of lands as above described under said emigration laws and regulations. The colony aforesaid at once entered into the possession of said described lands

above granted. There were over three hundred laborers who entered into possession, and have continued in possession of said grant and of said lands until this present time. There were about three hundred heads of families on said lands.

(The grant papers here shown witness.)

What is this paper?

It is the grant known as the civil colony of La Mesilla. The signature is the genuine signature of Guadalupe Miranda. This said grant has always been respected by the authorities of the government of Mexico and the State of Chihuahua, up to the date of the Gadsden-purchase treaty, as a legal grant of land under the laws of Mexico and Chihuahua, and the said grantees and their heirs and assigns have always, since date of said grant, been considered and respected as the legitimate owners and holders of said lands, and as such have been respected by every one. The boundaries are such as described in the grant itself, that is, in the paper shown me. The lands embraced in said grant are non-mineral. They are agricultural and pastoral lands.

I have no interest whatever in the grant aforesaid. At present there is a population of about fifteen hundred persons on said grant. There are two towns on the same, to wit: La Mesilla, which is the county-seat of Donna Ana county, and Picacho.

MARTIN TRUPILLO.

343 Sworn to and subscribed before me, this 22d day of December, 1873.

Witness my hand and the seal of court the day and year last named.

[SEAL.] DANIEL FRIETZE,

Probate Clerk of Donna Ana County, New Mexico.

GUADALUPE MIRANDA, being first duly sworn, testifies as follows: I live in El Paso, Mexico, and I am sixty-three years of age. In the year 1853 I was commissioner of emigration under the general laws of the government of the Republic of Mexico. (A printed copy of a decree marked C, of the government of Mexico, with rules marked B, prescribed by government of the State of Chihuahua, in the Spanish language, here shown witness—said printed copy hereto attached.) I was commissioner under this law and these regulations, (referring to the printed decree in Spanish hereto appended,) at the time above stated. In August, 1853, (the early part of August,) as commissioner above stated, and in virtue of the law and regulations cited, I made a grant of lands to the colony known as the civil colony of La Mesilla. (The official copy of the grant marked A, and attached hereto, here shown witness.) This (taking said copy in witness's hand and examining it) is the official copy of the grant made by me, as above stated, to the civil colony of Mesilla. This is my signature signed to said document. The original or duplicate of this is with the archives of the grant. I signed them both. One is kept with the archives, as stated, and the other one—this one—is for the grantees of the colony. The bound-

aries of the grant are as contained in this document. The lands embraced in the limits of this grant to the colony known as the civil colony of Mesilla, are situate in the present limits of the county of Donna Ana, and in that portion of the territory of the United States known as and acquired by the "Gadsden purchase." At the time this grant was made said lands were within the limits of the State of Chihuahua, Republic of Mexico. At the time this grant was made to said colony the grantees immediately entered into possession of said grant of lands, and have continued in possession of same without any molestation from any one ever since. Said grantees and their heirs have been always, since said grant was made, recognized as the legal owners and holders of said grant of lands, and have been so recognized and acknowledged by every one. My acts as commissioner aforesaid were approved by the general government of Republic of Mexico, also by the officials of the State of Chihuahua, and have been recognized as legal and binding by every one. The original grantees who entered into possession as above stated numbered not less than three hundred heads of families, and about one thousand five hundred souls. There are about that number now upon said grant holding under it. The lands of this said grant known as the civil colony of Mesilla, are non-mineral. I have no interest in the said grant. The copy of decree hereto annexed, and in the Spanish language, and above stated as the authority under which I made the grant before mentioned, is a true copy of the original decree of the government of the Republic of Mexico, officially signed by José Joaquin de Herrera, president of the Mexican Republic, and attested by Mariano Otero, secretary of state of said Republic. (Here the copy official in Spanish, and entitled "Reglamento para la organizacion de las colonias civiles y de mas poblaciones que se formen en el estado," and marked Exhibit B, shown witness.) This is a copy of the official rules which I had in my possession for my government, and which were prescribed under the decree before mentioned by the govern-
344 ment of the State of Chihuahua. (Said reglamento referred to by witness hereto attached.) These rules were complied with in reference to the said grant to the colony of Mesilla.

GUADALUPE MIRANDA.

Sworn to and subscribed before me this 29th day of December, 1873.

Witness my hand and the seal of court the day and year last named.

[SEAL.] DANIEL FRIETZE,
Probate Clerk of Donna Ana County, New Mexico.

Decision

Opinion of surveyor general.

This claim for lands is brought before me for examination and report under the act of Congress of July 22, 1854, establishing this office. It is the first case of a claim for lands, brought before this

office for approval, which lies within the region acquired under the Gads-en treaty of December 30, 1853.

By letter of February 17, 1872, from Hon. C. Delano, Secretary of the Interior, to Hon. Willis Drummond, Commissioner of the General Land Office, copy of which letter was furnished to this office by the honorable Commissioner, February 23, 1872, it was decided that this office possessed the same powers, under the acts of Congress of July 22, 1854, and August 4, 1854, in relation to lands within the Gadsden purchase, in the Territory of New Mexico, that it possesses as to lands acquired under the treaty of Guadalupe Hidalgo.

It appears from the record that, on the 4th day of August, 1853, Guadalupe Miranda, commissioner for that purpose, authorized by the government of Mexico and the State of Chihuahua, within whose limits the land was situated, granted the lands here claimed to a large body of colonists, numbering in all one thousand souls or more. The people have since remained in undisputed possession, improving and cultivating the same, and behaving as becomes good citizens, and it is believed that they would not have been disturbed in title or possession, by the authorities of Mexico or Chihuahua, had the territory not been transferred to the United States.

I therefore respectfully recommend that the title to the lands claimed be confirmed by Congress to the inhabitants of the Mesilla civil colony and their legal representatives according to the boundaries set forth in the grant papers executed by Guadalupe Miranda, commissioner, dated August 4, 1854.

I transmit copies of the complete record in triplicate.

JAMES K. PROUDFIT,
United States Surveyor General.

United States surveyor general's gffice, Santa Fé, N. M., February 12, 1874.

Authentication of Transcript.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *May* 22, 1874.

The foregoing is a correct transcript of the papers on file in this office in private land claim reported as No. 86, in the name of the colony of Mesilla.

JAMES K. PROUDFIT,
United States Surveyor General.

345 EXHIBIT OF PLAINTIFFS.

Testimonio of the Proceedings Carried on on a Land Grant at "Sierra Blanca," on the Left Side of the Rio Bravo del Norte, to the Resident Don Jose Lerma in 1823.

Petition.

To the very enlightened town council (ayuntamiento) of this town:

Don Jose Lerma, a native of Presidio del Norte and residing in this town, in due form of law would appear before your honorable

body and say that in consequence of and conforming myself to the colonization law issued on the 3rd of January of this year by the national constitutional assembly of this Empire, which gives preference to the natives of the country for land grants, I request that your honorable body be pleased to appoint a commissioner from your body to proceed to the place opposite the "sierra" (ridge of hills or mountains) called "La Sierra de todos Santos," or be it opposite the "Ojo de Toro" (Ball spring), on the left bank of the Rio Bravo del Norte, and to grant me the unimproved lands there existing for cultivation in the bends (ancones) of the same river, stock-raising on the adjoining "sierras," which I also claim to become my property as far as the "Sierra Blanca," lying east of said river, with all the watering places and minerals therein contained and the pasturages and other things included within said lands and "sierras" from opposite the said place of "El Ojo del Toro," on the left bank of said river, to the said "Sierra Blanca," establishing the boundaries which I ought to recognize if I be granted the favor which I solicit. I humbly pray that your honorable body may deem proper to accede to my petition in the name of the nation, inasmuch as I apply for this grant to settle those lands with other families who may wish to accompany me, opening fields of all kinds of grain, and also raising stock.

I swear that I do not act from malicious intent and make the necessary protestation.

Paso del Norte, August 15, 1823.

JOSE LERMA.

COUNCIL-ROOMS OF EL PASO, *August* 23, 1823.

This enlightened council, taking into consideration that the
346 foregoing petition is conformable to law, and that the petitioner, Don Jose Lerma, has been for some years in possession of the lands which he claims, the same enlightened council has deemed it proper that there be given by grant to Don Jose Lerma, a native of Presidio del Norte and residing in this town, the unimproved and wooded lands with the "sierras" for which he makes application, for stock-raising, cultivating the bends of the river, and all the other uses and benefits resulting from this grant.

Let all that has been done be brought to the knowledge of the most excellent deputation of Chihuahua in order that it may approve this grant if it be its superior pleasure.

The enlightened council of El Paso del Norte have thus resolve- in the council-rooms and signed hereto before me as the secretary, which I certify.

JOSE YGNACIO RASCON, *President.*
JOSE MORALES.
JOSE MA. VELARDE.
JOSE FRANCISCO CARBAJAL.
JOSE MANUEL GARCIA.
JUAN J. GIL.
LORENZO PROBENCIO.
JUAN MA. PONCE DE LEON, *Secretary.*

Approbation by the Most Excellent Deputation.

CHIHUAHUA, *October* 10, 1823.

Agreeably to the resolution of the enlightened council of the town of El Paso, this most excellent deputation have deemed it proper to approve the grant of all the lands, woods, and "sierras" applied for by the resident Don Jose Lerma, it being of advantage to the nation to open fields and to form settlements resulting in public utility, that enlightened council being ordered to appoint a commission that shall proceed to survey these lands and to give possession to the party interested, in the name of the supreme powers of the nation, of the lands, "sierras," woods, and pasturages applied for by him on the left side of the Rio Bravo del Norte.

JOSE IGNACIO URQUISE.

Paso del Norte, October 30, 1823.

347 *Decree of the Enlightend Council.*

Having received the foregoing application and approbation of the most excellent provincial deputation of Chihuahua to granting and putting the resident Don Jose Lerma in possession of the unimproved lands, woods, pasturages, and "sierras" for which he made application for the purpose of settling on the line of the Rio Bravo del Norte and on the left side from opposite the "Ojo del Toro" or be it the "Sierra de todos Santos" to the "Sierra Blanca," the enlightened council of this town, in compliance with the order of said most excellent deputation, resolved to appoint a commission of respectable and honorable persons who shall proceed to survey and delineate those lands and to put said Don Jose Lerma in possession thereof, this commission to be composed of Don Jose Ignacio Rascon, as president; Councilman (regidores) Don Jose Ma. Velarde, Don Jose Morales, Don Jose Manuel Garcia, Don Jose Francisco Carbajal, Don Juan Ja. Gil; Town Attorney (sidico del comun) Don Lorenzo Provincio, and the secretary, Don Juan Ma. Ponce de Leon, who shall proceed to fulfill their said commission on the 6th day of the next month of November, and upon having concluded the work they shall make report to this enlightened council for the necessary effects. Decreed, ordered, and signed by the president and other members before me, the secretary, which I certify.

JOSE IGN-IO RASCON, *Pres.*
JOSE MA. VALERDE.
LORENZO PROBENCIO.
JOSE MORALES.
JOSE MA. GARCIA.
JOSE FRANCISCO CARBAJAL.
JUAN J. GIL.
JUAN MA. PONCE DE LEON, *Secretary.*

At the place of "Al Ancon del Rio Bravo del Norte," on the left side, opposite the "Ojo del Toro" and the "Sierra de todos Santos," which lies on the right bank of the same river, on the tenth day of the month of November, eighteen hundred and thirty-three, the commission appointed for the demarcation of the bends of the unimproved lands, woods, pasturages, and "sierras" applied for by Don Jose Lerma for cultivating and stock-raising, where he
348 has already built some timber houses or huts (jacales), woth some crops of maize, wheat, and other vegetables, which he has harvested, the said commission, in discharge of its respective trust—which commission is composed of Don Jose Ignacio Rascon, president; the town attorney, Don Lorenzo Provencio; Councilmen Don Jose Ma. Velarde, Don Jose Morales, Don Jose Manuel Garcia, Don Jose Franco. Carbajal, Don Juan J. Gil, and the secretary, Don Juan Ponce de Leon—in order to execute the terms of this procedure and to comply with the orders of the enlightened council of the town of El Paso, and with the approbation of the most excellent provincial deputation of Chihuahua granting to Don Jose Lerma the said lands applied for by him, we began the survey according to law, and, standing on the ground, in presence of Senor Lerma, taking for initial or primordial point a cottonwood (alamo) on the left bank of the Rio Bravo, marking it with a cross, X, opposite the "Ojo del Toro" and the "Sierra de todos Santos," which are on the right bank, thirty-five thousand varas were measured, which terminate on the highest peak or summit of the "Sierra Blanco," having spent three days' work on this measurement, owing to the roughness of the ground, the commission deposing that the party interested shall erect there a landmark, and, passing the night at this place, with the remark that this measurement runs eastward, in the opinion of the commission, as it was not accompanied by a practical mathematician who could observe the courses with accuracy—

At about six o'clock in the morning of the fifteenth day of November, present year, the undersigned commission continued on its work with the appointed measures, who are Don Jose Man'l Garcia and Don Jose Francisco Garbajal, who promised to proceed with full legality in the measurements which are to be made and have been made from the "Sierra Blanco" to the "Sierra del Aguila," on the eastern side; fifty-five thousand varas were measured to
349 where the party interested was likewise instructed to erect another landmark. At this place the commission rested and slept subsequently to continue on their work; and from the "Sierra del Aguila" to some hot springs (ojos calientos) existing on the left bank of the Rio Bravo del Norte twenty-two thousany varas were measured on the southern boundary, said hot springs remaining within the property of the cla-mant, Don Jose Lerma, who was instructed to erect another landmark on the bank or said river, which said left bank shall be his last perpetual boundary, closing where the first measurement was commenced; and in this form the said survey was concluded, and Don Jose Lerma, who is

the party interested, being present the said commission asked him whether he was satisfied with the survey made, to its conclusion of those lands, woods, pasturages, and "sierras" applied for by him, granted to him, and of which, according to the law on the subject, possession is given to him, without prejudice of a third party claiming a better right, and he having answered affirmatively, having been present at the said measurements and the formality with which everything was done, Senor Rascom, president, with the said commission, in the name of the supreme powers of the nation, granted unto the said Don Jose Lerma and put him in possession of the lands above mentioned, with all their productions, as his lawful property, having taken him by the hand, caused him to walk over the tract of land, to throw stones, and to perform other acts of true possession, the said commission advising him in the name of the nation from whom he has received this bounty to exert himself for the prompt cultivation and possible settlement, so as to aggrandize her to the magnitude to which her liberality entitled her; and report having been made to the enlightened council of this town of the work of said commission on the 30th of November of said year, their work being concluded, the said enlightened corporation has re-
350 solved to approve it in all its parts, ordering that these proceedings be protocoled in the registers of the archives kept in the council-rooms, and that copies applied for by the party interested be delivered to him for his protection and that of his heirs and assigns, the present commission signing these acts before me, the secretary, which I certify.

JOSE IGNACIO RASCON.
JOSE MA. VALARDE.
LORENZO PROBENCIO.
JOSE MORALES.
JOSE MANUAL GARCIO.
JOSE FRANCISCO CARBAJAL.
JUAL J. GIL.
JUAN MA. PONCE DE LEON, *Secretary.*

Paso del Norte, December 12, 1823.

The land grant applied for by the resident Don Jose Lerma being approved by the enlightened council and by the most excellent provincial deputation of the city of Chihuahua, as is evidenced by the foregoing proce-dings carried on by the president of the appointed commission, who is also the president of this corporation, let this record be referred to its secretary for taxation of the *per diem* and writing therein, according to the tariff in force in this council, in order that the party interested may be informed of the fees he must pay; whereupon the originals shall be archived for the perpetual evidence, a certified copy being delivered to the party interested, as has been ordered, for his protection; and by these presents, the president and members comprising the enlightened corporation

have thus decreed and signed hereto before me, the secretary, which I certify.

JOSE IGNACIO RASCON.
JOSE MORALES.
JOSE MA. VELARDE.
LORENZO FRANCISCO CARBAJAL.
JUAN MA. VARELA.
JOSE MA. GARCIA
JOSE ALVARES.
JUAN MA. PONCE DE LEON, *Secretary.*

This is a copy of its original, from which it was this day transcribed, at the request of Senor Don Felix Lerma, on these seven leaves of common paper in default of the proper stamped paper, the party remaining obligated to replace it when it shall exist in the respective office; certified by me, citizen Pilar del Laso, 2nd alcade of this town of El Paso del Norte, signing with assist-
351 ing witnesses in default of a notary public, which I certify.

Paso del Norte, December 20, 1852.

PILAR DEL LASO.

Assisting:
FRANCISCO BARRON.
Assisting:
JOSE BEANES.

Fees on this testimonio, writing, authentication, comparing without the paper, 16 dollars, paid, to which I swear.

STATE OF TEXAS, }
County of El Paso. }

Before me, F. P. Clark, clerk of th- county court of El Paso county, State of Texas, on this day personally appeared Francisco Barron, proven by oath of Victor Ochoa, (known to me) to be the person whose name is subscribed as a witness to the foregoing and annexed instrument of writing, and after being duly sworn by me stated that Pilar del Laso was the person who executed the said instrument of writing, and that he had signed the same as a wotness at the request of said Pilar del Laso.

Given under my hand and seal of office, at the city of El Paso, this 1st day of October, 1897.

F. P. CLARK,
[SEAL.] *Clerk Co. Ct., E. P. Co., Texas.*

THE STATE OF TEXAS, }
County of El Paso. }

I, F. P. Clark, clerk of the county court of El Paso county, Texas, do hereby certify that the foregoing is a true and correct copy of the original document or certified copy of grant now on file in said court in Book 12, on pages 550, 551, 552, 553, 554, 555, and 556.

Given under my hand and seal of said court, at office, in El Paso, this 5th day of November, A. D. 1887.

[SEAL.] F. P. CLARK, *Clerk.*

352 STATE OF TEXAS, GENERAL LAND OFFICE,
AUSTIN, *September* 22, 1888.

— certify that ther foregoing first six pages and the first twenty-three lines of the seventh page contain a correct translation of a document in the Spanish language filed in this office on the 28th day of November, 1887, and existing in "file 2693, Bexar, 1st class," of the archives of this office; and I do further certify that the certificates of the county clerk of El Paso county appearing at the foot of said translation are true copies of the certificates attached to said Spanish documents.

X. B. DEBRAY,
Spanish Clk & Translator.

I, R. M. Hall, commissioner of the general land office of the State of Texas, do hereby certify that X. B. Debray, whose signature is subscribed to the foregoing certificate, is the Spanish clerk and translator of this office, duly qualified according to law, and that hi- official acts as such are entitled to full faith and credit.

In testimony whereof I have hereto set my hand and caused the seal of this office to be affixed on the day and date above written.

[SEAL.] R. M. HALL.

Endorsed: No. 4751. Enlightened council of El Paso del Norte, by President Jose Igno. Rascon. Original grant to Jose Lerma. Filed for record the 18th day of March, 1891, at 5 o'clock p. m. B. G. Thomas, clerk C. C., E. P. Co., by M. J. Clark, deputy. Filed this 2nd day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy. Emmett Pashal, Austin. Fees, $18.50. Oct. 30, 1823. Filed for record March 18th, 1891, at 3 o'clock p. m. Recorded Apri*n* 10th, 1891, at 3 o'clock p. m. B. G. Thomas, county clerk.

353 1852.

Ratification of Real Estate.

2ND JODGE, CITIZEN PILAR DEL LAZO.

To His Excellency Señor Don Jose Antonio Arce, lieutenant colonel, retired from the active army, and constitutional governor of the State of Chihuahua:

Citizen Jose Lerma, a lieutenant retired from the active army, would appear before Your Excellency in due form of law and represent that, in consequence of a decree of the most excellent provincial deputation of Chihuahua, issued on the tenth day of the month of October, year eighteen hundred and twenty-three, the coun-*li* of the town of El Paso granted and delivered to him fifty leagues of land on the left side of the Rio Bravo del Norte, about twenty leagues

distant from the town of "Nuestra Senor de Guadalupe del Paso," down the river, and containing the whole land from opposite the "Sierra de todos Santos," which is on the right side of said Rio Bravo, to the sierra called Blanca; thence to the other sierra called "Del Aguila," and thence to some hot springs on the left side of said river, with the bank thereof for his last boundary on the west. By virtue of this petition I have the honor to send to Your Excellency the proceeding carried on for the ratification. I would also state that it appears that the last counsil elected in the
354 town of El Paso refused to acknowledge the decree of the most excellent provincial deputation and that of the town council in eighteen hundred and twenty-three, and has sent to Your Excellency the titles for three grants of one league each for your approbation; which three grants are within the boundaries of said fifty-league tract which was granted to the undersigned.

In these terms he appeals to Your Excellency, praying that he be recognized in his rights of ownership of the lands which belong to him, confirming him in his said property which was granted to him in order that a settlement be formed in said lands, and that the council of the town of El Paso be notified accordingly. I pray for justice and make the necessary protestation at Paso del Norte May 12, 1828.

JOSE LERMA.

To the president of the council of the town of El Paso del Norte:

The decree or title of possession ordered to be given by the provincial deputation and the council of El Paso del Norte in the year 1823, whereby fifty leagues of land on the left side of the Rio Bravo were granted to Don Jose Lerma, has been ratified and confirmed by the second constitutional congress of this State in consideration of distinguished military services rendered to the Republic by the retired lieutenant, Jose Lerma.

355 Therefore this government considers that the land transferred by the granted bounty as an exclusive property of the said Lerma, ratifying it in all its parts. The council of El Paso del Norte will act accordingly. God and liberty.

Chihauhau, June 30, 1828.

JOSE ANTONIO AREC.
JOSE PASCUAL GARCIA, *Secretary.*

This is a copy of the originals, certified by me, citizen Pilar del Laso, second alcalde and judge of primary jurisdiction of this town, signing with assisting witnesses in default of a notary public, which I certify.

Paso del Norte, December 20, 1852.

PILAR DEL LASO.

Assisting:
FRANCISCO BARRON.
Assisting:
JOSE BEAUES.

Fees on this testimonio without stamped paper, there being none, five dollars; paid.

356 THE STATE OF TEXAS, }
County of El Paso. }

Before me, F. P. Clark, clerk of the county court in and for El Paso county, Texas, on this day, personally appeared Francisco Barron, known to me to be the person whose name is subscribed as a witness to the foregoing and annexed instrument of writing, and, after being duly sworn by me, state- that Pilar del Laso, the person who executed the said instrument of writing, acknowledged in his presence that he had executed the same for the purpose and consideration therein expressed, and that he and Jose Beaues had signed the same as witnesses at the request of the said Pilar del Laso.

Given under my hand and seal of office at El Paso, Texas, this twenty-fifth day of January, 1888.

[SEAL.]

F. P. CLARK,
Clk Co. C. El Paso Co.

(Filed Jan'y 25th, 1888, at 3.30 p. m.)
(Recorded " 26th, " " 2 p. m.)

357 *Certificate of True Copy.*

THE STATE OF TEXAS, }
County of El Paso. }

I, F. P. Clark, clerk of the county court of El Paso county, Texas, do hereby certify that the foregoing is a true and correct copy of the original instrument now on file in said court, in Book 14, on pages 48, 49, and 50.

Given under my hand and the seal of said court, at office, in El Paso, Texas, this 2nd day of March, A. D. 1888.

[L. S.]

F. P. CLARK, *Clerk.*

STATE OF TEXAS, GENERAL LAND OFFICE,
AUSTIN, *September* 22, 1888.

I certify that the foregoing first two pages contain a correct translation of a document in the Spanish language filed in this office on the 13th of March, 1888, and existing in " file 2693, Bexar, 1st class " of the archives of this office; and I do further certify that the certificates of the county clerk of El Paso county ap-earing on the third page hereof are true copies of the certificates attached to said Spanish document.

X. B. DEBRAY,
Spanish Clerk & Translator.

358 I, R. M. Hall, commissioner of — general land office of the State of Texas, do hereby certify that X. B. Debray, whose signature is subscribed to the foregoing certificate, is the Spanish clerk and translator of this office, duly qualified according to law, and that his official acts as such are entitled to full faith and credit.

In testimony whereof I have hereto set my hand and caused the seal of this office to be affixed on the day and date above written.

[SEAL.]

R. M. HALL,
Commissioner.

Endorsed: No. 47. 51. State of Chihuahua, by Governor Jose Antonio C—. Ratification of real estate to Jose Lerma. Filed for record the 18th day of March, 1891, at 3 o'clock p. m. B. G. Thomas, clerk C. C. E. P. Co., by M. J. Clark, deputy. Filed this 2nd day of October, A. D. 1888. W. E. Turner, clerk, by C. A. Richardson, deputy. (Filed for record 18th day of March, 1891, @ 3 p. m.) (Recorded 28 day of April, 1891, @ 1.30 p. m.) B. G. Thomas, clerk.

359 Be it further remembered that afterwards, to wit, on the twenty-sixth day of June, A. D. 1895, the same being the thirty-seventh day of the May term, A. D. 1895, the following further proceedings were had in the said cause, to wit:

Decree.

360 In the Court of Private Land Claims, Santa Fé District, May Term, 1895.

J. B. CESSNA, KATE CESSNA, His Wife; JOHN R. KEEDLE, Mary E. Keedle, His Wife; Esther G. Hunter; Eliza J. Bibb, Malon A. Bibb, Her Husband; Robert W. Sherman, Amelia C. Sherman, His Wife; Alice Wood; Alice M. Scott, Widow; James Scott, Guardian of I. Ethel Scott, Lucretia Scott, and Mabel Scott, Minor Children of Charles W. Scott, and Francis J. Heath, Widow of Robert J. Heath, Deceased; Grantees, Heirs, and Legal Representatives of John G. Heath, Deceased, Plaintiffs. } No. 59.

versus

THE UNITED STATES OF AMERICA and the Unknown Owners of The Dona Ana Bend Colony, Mesilla Colony, and Bracito Grants, Defendants.

John G. Heath or Juan Gid Grant.

Decree.

This cause having been tried and having been argued by counsel for all of said parties and submitted to and taken under advisement by the court at a former day of the present term, the court being now sufficiently advised in the premises, doth find that the said petition for the confirmation of the private land claim, commonly known as the "Juan Gid or John G. Heath" grant, situate in the county of Donna Ana, Territory of New Mexico, has not been sustained by satisfactory proof, and that the said title so asserted to the tract of land claimed to have been granted by the ayuntamiento of El Paso on the 3rd and 7th days of April, 1823, under the
361 law known as the colonization law of Iturbide of January 4th, 1823, to John G. Heath, under the name of Juan Gid, is of no validity, and that said grant or concession so claimed is not such an one as the United States are bound to recognize and confirm by virtue of the treaties of cession by Mexico to the United States:

It is therefore ordered, adjudged, and decreed that the claim to

the tract of land known as the "Juan Gid or John G. Heath" grant, situate in the county of Donna Ana and Territory of New Mexico, and being for a tract of land five leagues square, having for its central point the head of the Bracito acequia, under a grant alleged to have been made on April 3rd and April 7th, 1823, by the ayuntamiento of El Paso, under the law commonly known as the colonization law of Iturbide of January 4th, 1823, to John G. Heath, under the name of Juan Gid, is hereby rejected, and said petition is dismissed.

(Sig.) WILBUR F. STONE,
Associate Justice.

362 Be it further remembered that afterwards, to wit, on the nineteenth day of October, A. D. 1895, being the twelfth day of the October term, A. D. 1895, the following further proceedings were had in said court, to wit:

J. B. CESSNA *et al.*
vs.
THE UNITED STATES.

Come now the plaintiffs in the above-entitled cause and pray an appeal from the judgment heretofore entered in the cause to the supreme court; which appeal is allowed this 19th day of October, 1895.

363 And be it further remembered that afterwards, to wit, on the twenty-fourth of October, A. D. 1895, an opinion in this cause was filed in the office of said clerk; which said opinion is in the words and figures following, to wit:

364 In the Court of Private Land Claims, District of New Mexico.

J. B. CESSNA *et al.*
vs.
THE UNITED STATES *et al.* } No. 59.

Action for the confirmation of an alleged grant of lands in the Territory of New Mexico.

Mr. J. B. Cessna and Mr. T. B. Catron, for petitioners.

Mr. Matt. G. Reynolds, U. S. attorney; Mr. S. Burkhart, asst. U. S. attorney; Mr. Frank Springer, Mr. E. A. Fiske, Mr. S. B. Newcomb, Mr. H. L. Waldo, Mr. J. W. Vroom, for defendants.

Opinion of the Court.

REED, *C. J.:*

Plaintiffs seek the confirmation of a grant of land alleged to have been made on the 4th of April, 1823, by the ayuntiamento (town council) of El Paso to John G. Heath, under whom they claim—some by descent and others by purchase. The documentary evidence introduced shows that Heath presented his petition to the ayuntamiento, in which he stated his purpose to introduce into the

country thirty families of Catholic Christians, and asked that the lands in question be given him on which to settle the same. Favorable action was taken on his petition by the ayuntamiento and a committee was appointed to put him in juridicial possession of the property, which was accordingly done. We deem it unnecessary to set out the proceedings more fully, for the reason that our
365 disposition of the case is upon grounds in no manner affected by the mere form of the proceedings.

The parol evidence introduced shows that Heath after he had been given possession of the property returned to the State of Missouri where his family then was and of which State he had for many years been a citizen and resident. He there induced a number of families to become associated with him in the enterprise, and in the following year, the party, consisting of about one hundred and fifty persons, left Missouri for Mexico, taking with them a large amount of personal property. Subsequently he and many of his associates returned to Missouri, stating as reason for their return that when they reached Mexico they were not permitted to occupy the lands which had been given them, but were compelled to leave the country.

In making the grant the ayuntamiento assumed to act under the authority of a decree dated January 4th, 1823, promulgated by the emperor, Iturbide. The only portions of that decree which it material to consider are the 3rd and 4th sections, which are as follows:

SEC. 3. "The empressarios, by whom is understood those who introduced at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose, and any other particulars they may deem necessary in order that with this necessary information the executive may designate the province to which the must direct themselves: the lands which they can occupy with right of property and other circumstances which may be considered necessary.

SEC. 4. Families who emigrate not included in a contract shall immediately present themselves to the ayuntamiento of the place where they wish to settle in order that this body in conformity with the instructions of the executive may designate the land corresponding to them agreeably to the industry which they may establish."

There is controversy as to the correct translation of the fourth section. The translation set out above is that contended for by plaintiffs, and for the purposes of the case its correctness may be conceded. We think there are two grounds upon which the claim should be rejected:

366 First. It was families not included in a contract alone which the ayuntamiento was empowered by the fourth section of the decree to settle. The language of the section is explicit and the effect of the provision cannot be extended beyond the express words made use of. While Heath was not an empressario within the meaning of the third section, his petition and the action of the ayunta-

miento thereon clearly constituted a contract. His proposition was to introduce into the country a specified number of families, among whom should be persons of certain designated trades and professions, and as consideration for his undertaking in that regard the ayuntamiento undertook to give him the land. While the decree did not expressly reserve to the executive the power to contract for the introduction of parties of less than two hundred families, it clearly did not confer such power upon the ayuntamiento. Jurisdiction of the subject dwelt absolutely in the executive originally and unless conferred upon some subordinate continued there, and there is nothing in the decree from which the intent to confer it can be inferred; but if it be said that as the ayuntamiento had the power to make grants of land the one in question can be sustained as an exercise of that power independently of its character as a contract, we answer that, in our judgment, the grant was not made in the exercise of the powers actually conferred upon the ayuntamiento. The language of the fourth section is that "families who emigrate not included in a contract shall present themselves to the ayuntamiento of the place where they wish to settle in other that this body may designate the lands," &c.

El Paso, like other Spanish towns, is presumed to have had a grant of four square leagues of land, and the ayuntamiento had the power to make allotments of land within the four leagues so granted.

367 In our judgment, the power conferred upon the ayuntamiento by the decree with reference to foreign emigrants was simply to allot to them lands within the town grant after they had signified their desire to settle at that place; or if it should be said that the body had the power to make grants within the territory without the town grant over which it had jurisdiction, we answer that unless their power was enlarged by the decree they could make allotments only in the quantities prescribed by existing laws and regulations governing allotments within the town grant, and we find nothing in the language of the decree indicating an intention to confer such enlarged power. The lands attempted to be granted to Heath lie entirely without the four leagues belonging to El Paso and *is* much greater in extent than the grant to the town.

It seems to us incredible that the executive should have intended by the decree to confer upon subordinate officers living in remote provinces the power to dispose of the public domain to foreigners in unlimited amount upon such terms as they might choose, and yet that is what was done in this instance if the construction of the decree contended for by the petitioners should be sustained. In our opinion there is nothing in either the language of the document or the nature of the case which would warrant such construction.

Second. But if the power of the ayuntamiento to make a grant like the one in question upon the conditions named in the decree should be conceded there is another consideration which, in our opinion, is conclusive as against the petitioners. The power conferred upon the ayuntamiento was to grant lands to families who had emigranted and who presented themselves for settlement. Abso-

lutely no power was conferred to make grants to individuals who went into the country without families or in advance of them, and that was Heath's condition when the grant was attempted to be made. He had come alone into the country. Let it be conceded that the body had the power to designate the lands which should be given to him when he should return to the country bringing his family (ies) A with him; but until that condition should happen there was absolutely no power in the body to confer upon him any rights with reference to the land. If he had not returned to the country, bringing his family (ies) with him, no one
368 would contend, we think, that he had obtained a right or title to the property. All that was done in the matter then, on the occasion of his first visit to the country, amounted only to this: that the privilege was granted him of emigrating to the country with his family (ies) A and of settling upon the land, upon the happening of which conditions, if no change in the policy or purposes of the government should have occur-ed in the meantime, his property rights in the land would become perfect; but long before he returned to the country with his family—indeed, before he left it for the purpose of taking his family to it—the Emperor Iturbide was overthrown and the decree under which the privileges were extended to him had been revoked, and his own explanation of the failure of his expedition, made after his return to Missouri with his family, was that owing to the change in the form of government and the revocation of the decree the authorities of the country denied his right to the land and refused him permission either to occupy it or to remain in the country. That these events amounted to a revocation of the privileges granted him there is not the slightest doubt, and that it was within the power of the government to revoke it is equally clear. The settlement of foreigners in any country is a matter affecting the public policy of the nation and the government has absolute control over it, and a privilege of emigrating to and acquiring property in the country may be revoked at any time, however disastrous such revocation may be to those who suffer from it.

We think, therefore, that Heath did not acquire any interest in the property in question, and that the petition must be dismissed without remedy from this court.

369 And be it further remembered that afterwards, to wit, on the twenty-fourth day of October, A. D. 1895, a stipulation was filed in said cause in the office of said clerk; which said stipulation is in the words and figures following, to wit:

370 In the United States Court of Private Land Claims.

J. B. CESSNA *et al.*
vs.
UNITED STATES *et al.*

It is hereby agreed that the orders of the court with reference to the taking of the depositions in behalf of said plaintiffs, commissions, agreements of attorneys, and certificates of officers taking said depositions, as well as the Spanish interrogatories and answers, may be omitted from the record, the English interrogatories and answers or translations being given in each deposition of the following witnesses:

Depositions of—

Enrique Palmer, taken before notary public.
Balnida N. Jones, " " " "
Eliza J. Bibb, Francis J. Heath, John Bert, and Ester C. Hunter, taken before Thomas J. Powell, notary public.
Mary R. Keedle, taken before Charles H. Tanner, U. S. commissioner.
John B. Keedle, " " W. F. Button, notary public.
Maj. Horatio H. Hughes, taken before notary public.
Charles E. Woodruff, taken before R. M. Reynolds, notary public.
James Bryan, taken before John T. Birdrege, notary public.
Madalena de Carranco, taken before M. Cameron, U. S. consular agent.
Gregorio Herrera, taken before Teodoro Austin, U. S. consul.
Price Cooper, " " " " " "
Major T. T. Teel, taken before John C. Pearce, notary public.

In order to avoid duplicate or triple papers, it is hereby agreed that the copy of the grant in Spanish, Ex. L, and English copy, Ex. K, filed by plaintiffs when said suit was brought, as well as copy offered in trial, shall be omitted from this record, the same being supplied by a copy of the grant to Juan Gid or Doctor John G. Heath, April, 1823, in surveyor general's office of New
371 Mexico, being No. 410 of the old Spanish and Mexican archives and claim 505, Mexican and Spanish land grants, in the land office at Santa Fé, New Mexico, offered by defendants.

It is further agreed that Ex. Z, certified act of Congress, September 5th, 1859, relative to the claim of Hugh Stevens and Juan Garcia, may be omitted from the transcript.

It is agreed that Ex. S, Spanish and partly English copy of petition of Juan Gid or Dr. John G. Heath to Mexican government, December 27th, 1822, certified by the Mexican authorities at city of Mexico, may be omitted from the record, the same being supplied by a correct translation, marked Ex. S.

That petitioners have leave to withdraw Ex. V, if so desired.

It is stipulated and agreed by said parties that the following exhibits, introduced by the defendants on the trial of said cause, may be omitted from the record on appeal in said cause, to wit:

1. All of the files of the office of the surveyor general of New

Mexico in claim reported No. 6, known as the Hugh Stevenson grant, except the report of said surveyor general and the certificate of Juan Maria Ponce de Leon, political chief of the Bravos district, Ex. A[1] herewith.

2. All of the Spanish of the Doña Ana Bend Colony Grant papers, reported No. 85.

3. All of the Spanish of the Mesilla Civil Colony Grant papers, reported No. 186.

4. All of the files of the office of the surveyor general of New Mexico in claim reported No. 139, known as the Santo Tomas de Yturbide grant.

372 5. All of the files in the surveyor's general's office in claim reported No. 129, known as the Jose Manuel Sanchez Baca grant.

6. The official plats made under the direction of the surveyor general of New Mexico of the foregoing five grants and the filed notes of the surveys on which said plats are based.

7. The Spanish archive No. 1107, a translation of which was introduced by the United States as Defendants' Exhibit No. 5.

8. The official plats of townships 23, 24, and 25 south, in ranges 1, 2, and 3 east.

9. The original grant in Spanish of the Doña Ana Bend Colony grant.

10. The abstract of land entries made under public land laws, Defendants' Exhibit 11.

It is admitted by said parties that the Santo Tomas de Yturbide grant, reported No. 139, and the Jose Manuel Sanchez Baca grant, reported No. 129, were made by the same authorities and under the same laws as that to the Mesilla Civil Colony grant, which is included in the record.

It is admitted by said petitioners that the five private land claims referred to in this stipulation all conflict with the lands claimed by petitioners herein, and that the public surveys have been extended over all of said lands so claimed by said petitioners except that covered by the surveys of said private land claims, and it is further admitted by said petitioners that 71 entries under the public land laws of the United States have been made within the limits of the land here claimed by them.

It is agreed that the demurrer of the United States, Numa Raymond, *et al.* be inserted in the record, and that the demurrer of the Rio Grande Land Co., being similar thereto, shall be omitted from the transcript.

It is agreed that the summons issued and answered upon defendants, as per order of court, as well as the notice in Spanish and English to all parties in interest to appear within thirty days, dated March 27, 1893, and proof of publication thereof, shall be omitted from the transcript.

(Sig.) S. BURKHART,
Ass't U. S. Att'y.
J. B. CESSNA,
Att'y for Appellees.

373 Ex. A[1].

Citizen Juan Maria Ponce de Leon, political chief of the Bravos district:

I certify as far as the law allows that D. Juan N. Garcia, deceased, the father of the petitioner, asked for the possession of the land called El Bracito; that he lived there for many years, cultivating the land and raising stock of all descriptions; that almost at his own expense he entirely kept the Apaches at peace and rendered other very useful services to travellers and even to the entire nation until the savages by their insurrections and hostilities forced him to withdraw from said place. The land itself proves that it has been cultivated, as it is crossed by ditches (acequias). Some of the land is ridged and the ruins of the house still exist. I also know, not remembering the year, that an individual of the United States named Juan Gid asked for and received a grant of land at the same place from the Mexican authorities, respecting those of Don Juan A. Garcia. This he affirms, having been one of the commissioners in the measurement of the land asked for; and at the request of the party interested and for the purpose which he may deem necessary I give him these presents, which I sign at El Paso on the seventeenth day of March, one thousand eight hundred and forty-nine.

JUAN M. PONCE DE LEON.
FAUSTINO MONTES, *Secretary.*

374 And be it further remembered that afterwards, to wit, on the twenty-fourth day of October, A. D. 1895, a citation was filed in the said cause in the office of said clerk; which said citation is in the words and figures following:

375 *Citation on Appeal to Supreme Court.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Matt. G. Reynolds and Summer Burkhart, United States att'ys; Frank Springer, James W. Vroom, J. B. Newcomb, and Eugene A. Fiske, att'ys for other defendants, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, to wit, within *on the* sixty days from Oct. 19, 1895, pursuant to an appeal filed in the office of the clerk of the court of private land claims, wherein J. H. Cessna; Kate Cessna, his wife; John R. Keedle; Mary E. Keedle, his wife; Esther G. Hunter, Eliza J. Bibb; Malon A. Bibb, her husband; Robert W. Sherman; Amelia C. Sherman, his wife; Alice Wood; Alice M. Scott, widow; James Scott, guardian of I. Ethel Scott, Lucretia Scott, and Mabel Scott, minor children of Charles W. Scott, and Francis J. Heath, widow of Robert J. Heath, deceased, grantees, heirs, and legal representatives of John G. Heath, deceased, plaintiffs, are appellants, and The United States of America and the Unknown Owners of the Dona Ana

Bend Colony, Mesilla Colony, and Bracito Grants, defendants, are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19 day of Oct., in the year of our Lord one thousand eight hundred and ninety —.

JOSEPH R. REED,
Chief Justice Court of Private Land Claims.

On this 24 day of Oct., 1895, personally appeared before me, the subscriber, J. B. Cessna, and makes oath that he delivered a true copy of the above citation to Hon. Matt. G. Reynolds by mailing the same to his present address, Washington, D. C.

J. B. CESSNA.

376 Subscribed and sworn to before me this 24th day of Oct., 1895.

[Seal Court of Private Land Claims, Santa Fé, New Mexico.]

JAMES H. REEDER, *Clerk*,
By IRENEO L. CHAVES, *Deputy*.

We hereby acknowledge service of the foregoing citation for and on behalf of the appellants this 24 day of Oct., 1895.

JAMES W. VROOM,
EUGENE A. FISKE,
FRANK SPRINGER,
S. B. NEWCOMB,
By F. S.,
Attorneys for Appellants.

I hereby acknowledge service of a copy of the within citation.

S. BURKHART,
Special Ass't to Att'y Gen'l for Court of Private Land Claims.

377 *No. 59. John G. Heath or Juan Gid Grant.*

In the United States Court of Private Land Claims.

J. B. CESSNA, KATE B. CES-NA, His Wife; JOHN B. KEEDLE, MARY R. Keedle, His Wife; Esther C. Hunter, Eliza J. Bibb, Malon A. Bibb, Her Husband; Robert W. Sherman, Amelia C. Sherman, His Wife; Alice Wood, Alice M. Scott, Widow of James Scott, Guardian of L. Ethel Scott, Lucretia Scott, and Mabel Scott, Minor Children of Charles W. Scott, and Francis J. Heath, Widow of Robert J. Heath, Deceased, Grantees, Heirs, and Legal Representatives of John G. Heath, Deceased, Plaintiffs,

versus

THE UNITED STATES OF AMERICA and THE UNKNOWN HEIRS OF the Doña Ana Bend Colony, Mesilla Colony, and Bracito Grants.

Plaintiffs' Assignment of Errors on Appeal.

1st. The court of private land claims erred in finding and decreeing in said cause that the said petition for the confirmation of the private land claim commonly known as the "Juan Gid or John G. Heath" grant has not been sustained by satisfactory proof, and that this said title so asserted to the tract of land claimed to have been granted by the ayuntamiento of El Paso on the 3rd and 7th day of April, 1823, under the law known as the colonization law of Iturbide of January 4th, 1823, to John G. Heath under the name of Juan Gid is of no validity, and that the said grant or concession so claimed is not such an one as the United States are bound to
378 recognize and confirm by virtue of the treaty of cession of Mexico to the United States.

2.

The court further erred in ordering, adjudging, and decreeing that this claim to the tract of land known as the "Juan Gid or John G. Heath" grant, situated in the county of Donna Ana and Territory of New Mexico, and being for a tract of land five leagues square, having for its central point the head of the Bracito acequia, under a grant alleged to have been made on April 3rd and April 7th, 1823, by the ayuntamiento of El Paso, under the law commonly known as the colonization law of Iturbide of January 4th, 1823, to John G. Heath under the name of "Juan Gid," is hereby rejected, and said petition is dismissed.

We therefore pray this honorable court to reverse said decree.

(Sig.) T. B. CATRON,
(Sig.) J. B. CESSNA,
Att'ys for Appellants.

379 J. B. CESSNA *et al.* }
vs.
THE UNITED STATES. }

I, J. H. Reeder, clerk of the United States court of private land claims, by J. L. Chaves, deputy, *to* hereby certify that the foregoing three hundred seventy-eight (378) pages — a true, full, and complete transcript of all the pleadings, record proceedings, and files in my office, as also all the evidence and proof had, received, and heard in the cause, filed and tried in the court of private land claims of the United States, except that part thereof which was eliminated by stipulation of attorneys for appellants and appellees, filed and made a part of this transcript, in which case J. B. Cessna *et al.* are the appellants or plaintiffs and The United States *et al.* are the appellees or defendants, said cause being for the confirmation of a certain private land claim or grant commonly known and designated as the "Juan Gid or John G. Heath" grant.

In witness whereof I have hereunto set my hand and affixed the seal of said court of private land claims of the United States, at Santa Fé, New Mexico, this — day of October, 1895.

[Seal Court of Private Land Claims, Santa Fé, New Mexico.]

JAMES H. REEDER, *Clerk*,
By IRENEO L. CHAVES, *Deputy*.

Endorsed on cover: Case No. 16,079. Court of private land claims. Term No, 78. J. B. Cessna, Kate Cessna, his wife; John R. Keedle, *et al.*, appellants, *vs* The United States *et al.* Filed November 1st, 1895.

JAMES H. McKENN

Brief of Cessna & Rae
Supreme Court of the United Sta

OCTOBER TERM, A. D. 1897.

Filed Dec. 27, 1897.

No. 78.

J. B. CESSNA, J. B. KEEDLE ET AL.

vs.

THE UNITED STATES ET AL.

Appeal from Court of Private Land Claims.

ARGUMENT FOR APPELLANTS

BY

J. B. CESSNA.

ROBERT RAE,
T. B. CATRON,
J. B. CESSNA,
Solicitors for Petitioners.

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Supreme Court of the United States,

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THE UNITED STATES ET AL.

Appeal from Court of Private Land Claims.

ARGUMENT FOR APPELLANTS.

This case is appealed from the United States Court of Private Land Claims, and is here upon the following statement of facts:

The plaintiffs in this case in their petition alleging that they are the heirs and legal representatives of John G. Heath, asked for the confirmation of a grant of a tract of land made by the Ayuntamiento of El Paso, Mexico, April, 1823, under and by virtue of the colonization law of Mexico of January 4, 1823, to Juan Gid, English John G. Heath. This petition further alleges that on April 3, 1823, John G. Heath, under his Spanish name and signature Juan Gid, petitioned the Ayuntamiento or Town Council of El Paso, Mexico, to grant him a tract of land lying on the Rio Grande river, thirty or forty miles North-west from El Paso, taking the head of the Bracito acequia as the central point of a square two and a half leagues North, South, East and West, making a square of five leagues on each side. On same day said petition was accepted and the said Ayuntamiento in due formality of law proceeded to make, execute and deliver to the said John G. Heath (Spanish Juan Gid), a grant to said tract of land as prayed for. After publication of notice of said petition, read at a public meeting April 13, 1823, a commission was appointed by said Ayuntamiento with full authority in the premises to survey, mark, designate and separate said land from the public domain. On April 17th, 1823, said commission put the said John G. Heath, alias Juan Gid, into full possession thereof, and on the same day made a full, complete, and accurate report in writing of what they had done to the honorable Ayuntamiento aforesaid, which was thereupon accepted, adopted, and confirmed, April 25, 1823, it was consid-

ered by the said Ayuntamiento that the grant of said tract of land called the Bracito was concluded and the fee for the same was assessed and paid by the said John G. Heath, the grant was filed and recorded in the archives of said Ayuntamiento, a certified copy sent to the Governor of the province at Santa Fe, and there filed, where it remains to-day; and another copy given to the grantee.

These various proceedings in the making of said grant being properly translated are fully set out in plaintiff's petition. Copies of which were attached to and made a part of said petition marked Exhibit from "A" to "O," except Exhibits "K" and "L" which are English and Spanish copies of all the papers in the grant. In the arrangements made here of Exhibits, we have followed the order of the Ayuntamiento giving a copy of the proceedings of the town council of El Paso of April 3, 1823, last. This in plaintiff's bill is Exhibit "A." Copies of all the necessary and important parts of the proceedings in said grant are as follows:

EXHIBIT "B."

Copy of the proceedings had upon the petition of Juan Gid, Anglo-American, in which he prays that the tract of land of the Bracito be granted to him for a settlement and other matters herein appearing:

ISSUED BY THE ILLUSTRIOUS AYUNTAMIENTO OF THE TOWN OF EL PASO, DEL NORTE, YEAR 1823.

Dr. Juan Gid, citizen of the United States of North America, in due legal form appear before Your Excellency and represent, that not having received up to this date any reply to the petition which in December last, last year, I laid before the Ayuntamiento, your predecessor which sustained in all its parts, was forwarded by the said Ayuntamiento to His Imperial Majesty, under and by virtue of the authority which is conferred upon Your Excellency by the law of colonization which under date of January 3d of the present year was enacted by the National Organic Junta of the Empire, I therefore apply, de novo, repeating my prayer, and add that I propose to bring to the settlement of the land of the Bracito, which I ask be granted to me, thirty families of Catholic Christians, and among them mechanics, blacksmiths, armorers, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors, and to establish a hospital with the corresponding drug store, the same to be adequately stocked, together with the necessary instruments for any operation, and also to establish a warehouse stocked with all kinds of goods to sell at wholesale, and to introduce the necessary machines for the manufacture of woolen and cotton cloths, and another for the manufacture of powder, proposing until the expense of transportation is covered to furnish the supply of this article that the whole of this jurisdiction may require at the very low price of one dollar per pound, the same being of the first class for the use of arms, with the understanding that in all the professions cited those youths whose parents shall desire to have them learn the profession shall be admitted, the preference being allowed to the native youths of this country.

In consideration of the foregoing, and inasmuch as in order to establish the said machinery, cultivate the land and graze the live-stock and promote other out-door interests, it is indispensable that the land be large enough to meet all the requirements in the premises, it is therefore proper for me to demonstrate to Your Excellency that the land may be assigned me shall be at least enough for farm, and that the land be upon both sides, that is to say, upon both banks at the Bracito, for as in said tract is not regular, it is necessary to eject certain parties therefrom.

I also suggest that until time will permit the realization of the other cal-

culations the said settlement be annexed to the parish of this jurisdiction, and also that the pasturage and wood be used in common, with the same privilege as the other persons of this jurisdiction, with the understanding that no prejudice shall be occasioned the planting grounds, and that your petitioner be designated as the person for the distribution of the said land, and to be respected as the legal justice for the said families.

The welfare of the soul being to me what I prize above all things, and as I unite myself with my brethren the faithful people of this empire, and I keeping myself always in quiet peace so as to prevent any calumnious reports, I ask Your Excellency, if deemed proper, and in order to carry out in all respects the aforesaid colonization law, that the people of this jurisdiction be informed of this my petition to the end that all those men that may choose to do so may agree and regulate themselves in view of the right to preference, to the end that Your Excellency, to whom is charged the power as father of this country, should weigh in its value the incalculable benefits that through my petition may result, which far from being deprived of them should be encouraged in every way to procure its increase.

Therefore, I ask and pray Your Excellency to be pleased to accede to my prayer and to excuse the defect of not having drawn this my petition on paper of the proper stamp, there being none in the country, I standing ready to satisfy the fees that are due the National Treasury; I protest not to act in dissimulation and whatever be necessary, etc.

Paso, 7th April, 1823.

JUAN GID.

EXHIBIT "C."

Town Hall of El Paso, April 7, 1823, the petition of Juan Gid being presented, the same was granted by the honorable body upon the terms agreed upon in the proceedings of this day, which becoming known to Juan Gid he agreed to the same, and therefore on Sunday, the 13th instant, the said application and action thereon will be published at this place for the purposes indicated.

Thus Jose Ygnacio Rascon and Jose Morales, constitutional alcaldes and executors of the orders of its Excellency, have commanded and signed before me, the corporation secretary, to which I certify.

JOSE YGNACIO RASCON.
JOSE MORALES.

JUAN MARIA PONZE DE LEON, Secretary.

EXHIBIT "D."

At the town of El Paso, Del Norte, on the 13th day of the month of April, year one thousand eight hundred and twenty-three, being assembled in the hall of the honorable town council, with a large attendance of the people who had been called together by the customary previous notice, the petition of Juan Gid and the action thereon was publicly read and the people having heard the same and being asked by the first alcalde as to whether they were satisfied with the new residents who intended to locate in this jurisdiction, he was answered by many voices in the affimative, manifesting satisfaction and no opposition, wherefore and whereupon it was decided that upon the sixteenth day of the present month, in pursuance of the action aforesaid, Jose Morales, Alcade of second election, Jose Maria Belarde, first alderman; the corporation Attorney, Lorenzo Pravo, and the corporation secretary, proceed with the petitioner to the place Bracito for the purpose of executing the survey and carrying out the directions of its excellency made under the sovereign decree of January 3rd, concerning the colonization system.

Thus have the two alcaldes hereby agreed and signed before me the public secretary, to which I certify.

JOSE YGNACIO RASCON.
JOSE MORALES.

JUAN MARIA PONZE DE LEON, Secretary.

EXHIBIT " E."

TOWN HALL OF EL PASO,
April 15th, 1823.

Agapito Albo, deputy in the most excellent corporation of this Province and who resides at this town as Attorney for this corporation appeared and stated; that in the performance of his duty, and as deputy from this district, he said that the Ayuntamiento having determined to favor the families which Juan Gid proposes to establish at the Bracito, it appears to him that the fields and mills which the new settlers proposed to establish might in a few years be injurious to the old settlers of this entire jurisdiction on account of the water above being cut off and and consumed in those fields, it could not reach the other fields in the abundance desired, which statement being received by the honorable members. they proceeded to discuss the same, and it was resolved by an unanimous vote that the petitioner Juan Gid be called, who being present stated, that should the event arrive of a scarcity of water in this bounteous river it was understood by himself and the families with him that they should be governed by the wise and prudent laws of the empire and by the regulations of the Ayuntamientos, whose duty it is under the laws to see that water is properly distributed. In consideration of this, and that the said Juan Gid again expressed his subjection to the laws and ordinances of the empire, it was resolved to continue the execution of the decree of the 13th instant, made in compliance with the first action of its Excellency.

It is hereby so determined and ordered the members composing this honorable corporation signing this decree before me, corporation secretary, to which I certify.

Jose Ygnacio Rascon.
Jose Morales.
Jose Maria Belarde.
Jose Francisco Carbayal.
Juan Maria Barela.
Antonia Prudencio.
Jose Maria Garcia.
Saturnino Aguilar.
Jose Manuel Garcia.
Juan Jose Gil.
Lorenzo Provo.
Jose Albares.

Juan Maria Ponze de Leon, Secretary.

EXHIBIT " F."

TOWN HALL OF EL PASO,
April 16th, 1823.

The preliminaries for proceeding to the execution of the survey of the tract of Bracito and the act of possession thereof to Juan Gid, the papers in their present condition will be turned over to the commission composed of Messrs. Jose Morales, Second Alcade, Alderman Jose Maria Belarde, Public Attorney, Lorenzo Provo, and corporation Secretary Juan Maria Ponze de Leon, in order that when their purpose is accomplished in accordance with the foregoing decree, they may return the same to this corporation for the necessary remaining proceedings thereon.

And the honorable Ayuntamiento has hereby so determined, the President of the same signing this order before the secretary thereof to which I certify.

Jose Ygnacio Rascon.

Juan Maria Ponze de Leon, Secretary.

EXHIBIT "G."

Bracito, April 17th, 1823.

The commission appointed by decrees of the honorable Ayuntamiento consisting of four individuals for the purpose of executing the papers in this case, having accepted the charge, we proceeded to this place, where, in accordance with instructions, taking the head of the Bracito acequia for the central point of the estate into possession of which Juan Gid is to be placed, he in sign of possession with an ax cut the bark from two cottonwood trees and where the wood of the trees was exposed, wrote thereon, " Hazda de Dn. Juan Gid," and the present year on both of the trees.

And then the commission as well as the party interested Juan Gid, being present, they appointed surveyors Messrs. Francisco Lucero and Jose Royval, who promised to perform with fidelity the duties of their appointment, for the commencement of which they were furnished with an iron chain in good condition, which being measured with the utmost care contained eleven varas of three geometric feet according as required by the colonization law.

Immediately thereafter the first survey was commenced, about one o'clock in the afternoon, towards the north (having ascertained this point with perfect reliability, for the process was executed by an Anglo-American mathematician, who took the courses with the compass) concluding the measure at four o'clock the same evening, upon a hill, it being in line where a landmark, a cross, was placed, at the foot of which Juan Gid buried a stone with his name and the date being written thereon, and which stone was acknowledged by him to be his legal boundary, and the full measurement of two and a half leagues of five thousand varas from the center. And turning toward the east the survey was commenced at about three o'clock in the afternoon using the compass, for taking an air line as there was no water observed on that course that might be desirable for a settlement or a ranch, and it was estimated that the two and a half leagues was reached upon a hill called La Cueva in the Organ Mountains. And taking up the survey at about half past four o'clock in the evening from the landmark, a cross, and running west it was continued until sundown, passing on the line the road going to the salt river, and descending a ridge a league and three cordels of 110 varas was completed, and at sunrise the survey was again continued until completing the two and a half leagues which was done upon a hill belonging to the Roblero Mountain between a black mountain on the left and a red one on the right, and with the same formality as with the other landmark, the corner was placed at this point. And at about 12 o'clock the commission, the party interested, and the surveyors returned to the central point of said land, where, at about three o'clock p. m., the first survey was taken up and run south, continuing the survey of the line until sunset, where a league and three cordels of 110 varas was finished. At sunrise the survey was continued until two and a half leagues was completed which was done in a small valley running up from the river towards the prairie below the Mesilla and opposite the Ochoa bluffs, where a landmark, a cross, was placed with the same formality as the other landmarks. And the survey being continued west from the line running south with only the compass, the same was extended to where the two and a half leagues reach, for the same reasons as given for the line run eastward to the Cueva of the Organ Mountains, the line being completed at half past nine o'clock a. m.

And beginning to run eastward about ten o'clock of the same day there were up to the Copper road 19 cordels of 110 varas, and up to the river 59 varas, where it being the hour of mid-day the said survey was suspended, which hour having passed the survey was resumed at about two o'clock p. m., and continued until the two and a half leagues was finished which was upon a hill lying to the right of the Trujillo Salt Lakes, somewhat in advance of these and opposite the last ridge of the El Paso mountain called the Puerto de los Alamitos, and in a line with the watering place of Las Crucitas, where, about three o'clock p. m., was placed the corner landmark with the usual formality, with which requisite proceeding, the survey with the vara of three geometrical feet was concluded, and in which proceeding the alcade commissioned inquired in due legal form of the surveyors whether they had proceeded in the legal manner that they promised to observe in running the first line they surveyed of that tract, and they replied that they had so acted, and they had no doubt and rested under no responsibility as they acted as they had promised to do, whereupon the party interested, Juan Gid, was asked whether he was satisfied with the whole survey made of the land into full possession of which he was to enter under the colonization laws, and he replied that as he had witnessed the formality that was observed throughout the execution of the survey of his land he was in all respects satisfied.

With which understanding and there not having appeared any claim to suspend the carrying out of these proceedings, this commission placed the said Juan Gid in lawful possession of the said land, informing him that the cultivable land he has upon the tract is the greater part of the prairie of the river, and that this land he should not use except for the cultivation of the various kinds of edible grain, and for the production of the necessaries for his agricultural business, and that the land granted him outside of the said river prairie is deemed sufficient for the raising of all kinds of live-stock, charging him also that he should convey all the water he may use for the

running of the machinery he proposes to erect as well as all other water to the main channel, so that this city nor any other vicinage of which it is the seat shall in any manner be injured, and informing him finally that the object for which the four individuals present had come commissioned was concluded with this instrument which contained the proceedings up to this juncture was signed by the alcade Jose Morales, Alderman Jose Maria Belarde, Corporation Attorney Lorenzo Provo, the grantee John Gid, and surveyor Francisco Lucero, the other surveyor Jose Roybal not signing as he did not know how to write, the latter making however with his own hand the sign of the cross, before me the Corporal Secretary, to which I certify.

JOSE MORALES,
JOSE MARIA BELARDE,
LORENZO PROVO,
FRANCISCO LUCERO.
JOSE ROYBAL.

JUAN MARIA PONZE DE LEON, *Secretary.*

Having fulfilled the commission conferred upon us by the honorable Ayuntamiento in the matter set forth in these papers, these will be returned to that body in order that it may proceed as indicated in its decree of the 13th instant.

It is hereby so determined by the four commissioners this 21st day of April, 1823, before the secretary to which I certify.

JOSE YGNACIO RASCON.
LORENZO PROVENO.

JUAN MARIA PONZE DE LEON, *Secretary.*

EXHIBIT "H."

TOWN HALL OF EL PASO,
April 22, 1823. Third year of our Independence.

The Ayuntamiento has this day received the report of what, by its direction, was done by the committee appointed from that body for the purpose of executing the survey that was to be made of the Bracito tract, of the same, to be five leagues of each course, the whole comprising an Hacienda conformably with Article 5 of the colonization law, and which tract was granted by the ayuntamiento to Juan Gid for settlement according as hereafter set forth, and he agreeing to what has been done in the premises in all respects by the commission, the same has been reduced to writing in due form, and signed by the president, and other members constituting the Ayuntamiento before me the secretary, to which I certify.

JOSE IGNACIO RASCON.
JOSE MORALES.
JOSE MARIA BELARDE.
JOSE FRANCISCO CARBAYAL.
JUAN MARIA BARELA.
JOSE MARIA GARCIA.
SATURNINO AGUILAR.
JOSE MANUEL GARCIA.
LORENZO PROZO.
JOSE ALBARES.

JUAN MARIA PONZE DE LEON, *Secretary.*

TOWN HALL OF EL PASO,
April 23rd, 1853.

Juan Gid has this day presented a map which was drawn by the Mathematician Guillermo Box, showing the courses and drafted comformably with the survey which was executed of the Bracito tract of land, and the same appearing to this body very useful if annexed to the papers for its clearness and exactness in all time it will be so ordered.

And by this decree it was so determined, ordered and signed before me the secretary to which I certify.

JOSE YGNACIO RASCON. ANTONIO PRULENCIO.
JOSE MORALES. JOSE MARIA GARCIA.
JOSE MARIA BELARDE. SATURNINO AGUILAR.
JOSE FRANCISCO CARBAYAL. LORENZO PROZO.
JUAN MARIA BARELA. JOSE ALBARES.

JUAN MARIA PONZE DE LEON, *Secretary.*

TOWN HALL OF EL PASO,
April 25th, 1823.

It appearing to this ayuntamiento proper to annex to the papers the resolution of this body, of the 3d day of this month, concerning the grant to the Bracito tract of land to Juan Gid, it will be so annexed for the greater clearness and illustration of the matter. And the president of this honorable body hereby so decreed, ordered and signed, before me the secretary, to which I certify.

JOSE YGNACIO RASCON.

JUAN MARIA PONZE DE LEON, *Secretary.*

EXHIBIT "J."

TOWN HALL. EL PASO.
April 25, 1823.

It being considered by this Ayuntamiento that this case is concluded in which the land tract of the Bracito was granted for settlement to Juan Gid, an Anglo-American of the United States, the fee on the same will uow be assessed, which will be done in accordance with the tariff governing in this Ayuntamiento, and by its secretary, to the end that Juan Gid may be advised of the fees he will have to pay for what has been done in this case, this original be filed for perpetual evidence, and without the risk of failure to report by the first mail or by some safe conveyance to His Excellency the Governor of this Province, forwarding one certified copy to him for his information, and a like copy to the party interested for his security.

And by this decree the president and members of this body so resolved and signed, before the Secretary, to which I certify.

JOSE YGNACIO RASCON. SATURNINO AGUILAR.
JOSE MORALES. JOSE MANUEL GARCIA.
JOSE MARIA BELARDE. LORENZO PROVO.
JOSE FRANCISCO CARBAJAL.

JUAN MARIA PONZE DE LEON, Secretary.

A copy from the original papers drawn up at the request of Juan Gid in the grant to him for settlement of the Bracito tract of land under the colonization laws, together with other documents elsewhere referred to, and which original remains duly on file, to which I certify.

JUAN MARIA PONZE DE LEON,
Secretary.

Exhibit "O" is a copy of the draft of the survey of the land granted, which draft was attached to and made part of the records of the original grant. As the certificate shows, it was made by Wm. Box, by order of the Gentlemen Commissioners of this jurisdiction of El Paso for the Illustrious Ayuntamiento. Wm. Box, being an American mathmetician, the Spanish name Juan Gid does not appear in the draft, but the original certificate in Spanish contains the name of Dr. John G. Heath.

EXHIBIT "A."

TOWN HALL OF EL PASO,
Del Rio Del Norte,
April 3d, 1823. Third year of our Independence.

In session of this day came Juan Gid, a physician, Anglo-American, from the State of Missouri, inquiring what had been done with the petition which had been addressed through the former Ayuntamiento, under date of the 27th of December of last year, to His Imperial Majesty, by the office of the Secretary of State, and it is answered to him that there has been received no direct reply, but that the Government of this province, through Captain General Jose Antonio Viscarra, civil and military chief, in his official communication of the 2d of March, transmitted and commanded to be published and carried out the decree of the 3d of January of the present year, emanating from the Organic National Junta and sanctioned by his Imperial Majesty, and whose thirty-two (32) articles treat of the subject of colonization. These were read to the said Juan Gid, and he being fully informed thereupon has this day made a new application praying that by virtue of the law and of his privilege a grant to be made to him for a hacienda on the same tract that he applied for, promising for the benefit of this people of the Mexican nation, to fulfill all that he in that petition promises to do.

This body bearing in mind the colonization laws referred to and the aforesaid propositions which it deemed beneficial and favorable to this people, and hearing the opinion expressed by persons of this community, resolved as follows concerning the petition:

FIRST. That with the superior will of the Governor, to whom report will be made, his petition is admitted and its proposition accepted, and when he shall present himself, the land he applies for shall be designated to him in the following terms: The head of the Bracito acequia shall be the central point of the square of the said tract; that is to say, two and a half leagues from the river and the same on the side formed by the square.

SECOND. That considering that this jurisdiction, whose territory extends to San Diego, contains timber up the river only, and that Juan Gid and the families with him pasture their stock in that direction, they may locate their hacienda only upon land to be used for field factories, machinery, etc., and not upon the natural pastures and timber grounds which shall be in common for these inhabitants and this jurisdiction, as they are also for the new settlers.

THIRD. That this resolution and the application of Don Juan be made public in order that, should any Mexican citizen of the jurisdiction make for the benefit of the community similar propositions and promise to observe the respective articles of the dec e aforesaid, such application may be accepted in preference to any foreigr r, and for that purpose a term of three days is allowed, and the same term will also serve as time in which the public may manifest whether with their full consent they will have these neighbors, who promise them instructions in trades and manufactures, they settling at the Bracito, which is a distance of sixteen or eighteen leagues from the jurisdiction on the frontier, and adjoining the regular ranchries of the Apaches.

FOURTH. That Juan Gid holding the proprietorship of the lands of the Hacienda, any of the inhabitants of this district desiring to remove to the Bracito, for the purpose of settling at the place, must arrange with him.

FIFTH. The propositions made by the new colonist in favor of this community are accepted, and it is hoped that he will fulfill them, as well as the articles of the colonization decree, which contemplate him, and this Ayuntamiento enjoins it upon him that the families he may transport hither may be persons of probity and of the apostolic Roman Catholic faith, the only religion in all the empire, the laws of which they shall all obey, though they do not become naturalized.

SIXTH. That some of the alcaldes, an alderman and a corporation attorney, will proceed to the survey of the limits of the hacienda, and the giving of possession thereof, and they, together with Juan Gid, will ascertain on the tract of the hacienda the lands proper for settlement, agriculture, machinery and manufactures, and separate the same from those proper for pasturage and stock-raising.

And it is expected from the new settlers that as soon as possible they will surround themselves with groves and will preserve order by police, so as to

afford more easy spiritual and temporal illustration and administration, the same to be regulated by the ordinary secular and ecclesiastical authorities respectively, for which purpose they will proceed under this act, of which an authentic copy will be made for the security and information of the party interested, this original and the petition of Don Juan to be placed on file for perpetual testimony.

Thus, the honorable members have resolved, they together with the two alcaldes signed this act, before me, the corporation secretary, to which I certify.

Jose Ygnacio Rascon.	Jose Manuel Garcia.
Jose Morales.	Jose Ma. Garcia.
Jose Maria Belarde.	Juan Gil.
Jose Francisco Carbajal.	Lorenzo Provo.
Juan Maria Barela.	Jose Albares.

Juan Maria Ponze de Leon, Secretary.

A copy from the original in the record book of the acts of this honorable corporation, kept in my office, to which I certify.

Juan Maria Ponze de Leon,
Secretary.

Plaintiffs petition further alleged, that all of which said papers are included in one general exhibit herewith filed, marked Exhibit K, to which is attached the certificate made by the Secretary of the Ayuntamiento, that the same is a copy from the original papers drawn up at the request of Juan Gid, in the Grant to him for the settlement of the Bracito tract of land, under the colonization laws together with other documents elsewhere referred to, and that the original thereof remains duly on file, to which he certified.

The said Exhibit K is a correct translation of the said copies which were forwarded to the Governor of the Province of New Mexico, and which said copy so forwarded to him has ever since remained on file among the archives of the Territory of New Mexico, and is now on file as one of the original papers belonging to the archives in the office of the surveyor-general of the territory of New Mexico, to which reference is hereby made for a more specific understanding of the same. (See page 157 of Record.)

The petitioners alleged that the said Juan Gid complied with all the conditions and requirements of said grant and the law under which it was made, so far as he was required to do by law, and the acts of the grantors.

Petitioners further show by virtue of the proceedings above recited and mentioned, that the grant to said Juan Gid became an absolute and perfect grant, and the said Juan Gid obtained a perfect title to said land; and that the petitioners as his heirs, descendants and legal representatives of his heirs and descendants, have become and are the owners in fee of said lands and entitled to the same as an absolute and perfect grant, and are entitled to so hold and possess the same.

Petitioners further state that there are three settlements either wholly or in part within the limits of said grant, one being the settlement known as the Dona Ana Bend Colony, another being

the settlement known as the Messilla Colony, and the other being the Hugh Stevenson tract of land, so called; that the settlements comprise two or three thousand people, the name of said settlers constituting them being to your petitioners unknown, and they being also too numerous to mention herein, your petitioners being all residents beyond the limits of this Territory and not being familiar with the names of the persons residing within the limits of said tracts of land; and that they are therefore unable to give the names of any of the parties so residing within the said limits; and petitioners are informed that some other supposed grants or concessions have been made by the United States to individuals unknown to the petitioners, which grants of lands petitioners cannot now specify or describe, nor give the names of the parties to whom they were made; and petitioners therefore pray that proper notice may be given to such of them as this court shall direct, and in the manner that this court may direct.

By order of court notice was given, and parties have appeared by counsel.

The said claim of Petitioners to said lands has never been confirmed, considered or acted upon by Congress or the authorities of the United States or heretofore submitted to any authorities of the United States, or to any authorities constituted by law for the adjustment of land titles within the limits of said Territory of New Mexico so acquired by the United States; and by them has not been reported upon unfavorably or recommended for confirmation or authorized to be surveyed; but the protocol of the original papers making said grant of land has always been preserved in the archives at Santa Fe, Territory of New Mexico, and reported by the surveyor-general of said territory within recent years to the United States General Land Office at Washington as document No. 505 relating to Mexican and Spanish Land Grants, in archive No. 410.

Petitioners further state that said Juan Gid, alias Dr. John Heath, was a Roman Catholic and professed the Roman Catholic religion, the only religion of the Country of Mexico, "having united himself with his brethren, the faithful people of the empire." Heath died in America in 1850 or '51. See record, page 96.

And petitioners also file map heretofore marked Exhibit O, and included in the grant papers and made a part of this petition, as being a correct plat of the land in dispute.

Petitioners therefore pray that this their petition be considered by this honorable court and that the validity of said grant of lands so made as aforesaid be inquired into and decided, and that said tract, with the boundaries hereinbefore set forth, be confirmed unto the plaintiffs, their heirs and assigns forever, and for such other and general relief as to this honorable court may seem right and proper.

The defendants demurred to plaintiff's petition, giving dif-

ferent causes, all of which might be included in first specification. See 11th page of record.

First. "That the claimants have not in and by their said petition made or stated such a cause as entitles them in this honorable court to any relief as to the matters contained in said petition." After argument at length, the U. S. Court of Private Land Claims overruled the demurrer.

Law Under which the Grant was Made.

This grant was made under and by virtue of the Colonization Laws Imperial Degree No. 5, of the National Junta of the Mexican empire January 4, 1823.

White's Recop. p. 588.
Hall's Mexican Law, Art. 256.
Early Laws of Texas, p. 42.
Rocknell's Spanish Laws, p. 617.

The provisions and sections of this law necessary and essential to a proper construction of our case are as follows:

Augustin, by divine province, and by the congress of the nations first constitutional emperor of Mexico, and grand master of the Imperial order of Guadalupe; To all who shall see these presents, know ye that the junta nacional instituyente of the Mexican empire has decreed and we sanction the following:

The junta nacional instituyente of the Mexican empire, being convinced by the urgent recommendation of the government of the necessity and importance of giving to the empire a general law of colonization, have thought proper to decree as follows:

SECTION 1.—*Civil Rights.*—The government of the Mexican nation will protect the liberty, property and civil rights of all foreigners who profess the Roman Catholic apostolic religion, the established religion of the empire.

SEC. 2.—*Distribution Lands.*—To facilitate their establishment the executive will distribute lands to them, under the condition and terms herein expressed.

SEC. 3.—*Duty of Empresarios.*—The empresarios, by whom is understood those who introduced at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose, and any other particulars they may deem necessary in order that with this necessary information the executive may designate the province to which they must direct themselves: the lands which they can occupy with right of property, and other circumstances which may be considered necessary.

SEC. 4.—*Settlement of Families.*—Families who emigrate, not included in a contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

SEC. 5.—The measurement of land shall be the following: Establishing the vara at three geometrical feet; a straight line of five thousand varas shall be a league; a square, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two or more sitios: five sitios shall compose one hacienda.

SEC. 7.—*Labor Defined.*—One labor shall be composed of one million square varas; that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two or more labors. These labors can be divided into halves and quarters, but not less.

SEC. 8.—*Amount of Land to a Colonist.*—To the colonists, whose occupation is farming, there cannot be given less than one labor, and to those whose occupation is stock raising, there cannot be given less than one sitio.

SEC. 9.—*Same.*—The government of itself or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeable to the conditions and circumstances of the colonists.

SEC. 10. Establishments made under the former government which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

SEC. 11.—*Equal Distribution.*—As one of the principal objects of laws in free governments ought to be to approximate, so far as possible, to an equal distribution of property, the government, taking into consideration the provisions of this law, will adopt measures for dividing out the lands, which have accumulated in large portions, in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands to be fixed by appraisers.

Sections 12, 13, 14, 15, and others omitted relate to cities, towns, villages and questions not material to our grant.

SEC. 19.—*Grants to Empresarios.*—To each empresarios who introduces and establishes families in any of the provinces designated for colonization, there shall be granted at the rate of three haciendas and two labors, for each two hundred families so introduced by him, but he will lose the right of property over said lands should he not have populated and cultivated them in twelve years from the date of the concession. The premium cannot exceed nine haciendas and six labors, whatever may be the number of families he introduces.

SEC. 20—*Alienation at the end of Twenty Years.*—At the end of twenty years the proprietors of the lands, acquired in virtue of the foregoing article, must alienate two-thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one-third part.

SEC. 21.—*Same.*—The two foregoing articles are to be understood as governing the contracts made within six months, as after that time, counting from the day of the promulgation of this law, the executive can diminish the premium as it may deem proper, giving an account thereof to congress, with such information as may be deemed necessary.

SEC. 22.—*Right of Occupants.*—The date of the concessions for lands

constitutes an inviolable law for the right of property and legal ownership; should any one through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

SEC. 23.—*Cultivation*—If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; *in which case the respective Ayuntamiento can grant it to another.*

SEC. 24.—*Tiths, Duties, Etc.*—During the first six years from the date of the concession the colonist shall not pay tiths, duties on their produce nor any contribution under whatever name it may be called.

SEC. 25.—*Same.*—The next six years from the same date they shall pay half tiths, and half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time they shall in all things relating to taxes and contributions, be placed on the same footing with the other citizens.

SEC. 29.—*Land May be Alienated.*—Every individual shall be free to leave the empire, and can alienate the lands over which he may have acquired the right of property, agreeably to the tenor of this law, and he can likewise take away from the country all his property, by paying the duties established by law.

This is not an Empresarios grant, but was made to Heath as a colonist under the law of 1823 by which the minimum and not the maximum quantity of land to be granted to a colonist was limited —to a farmer there could not be given less than one labor and to a stockman not less than one sitio, and if deemed proper said grant of land might be augmented agreeable to the conditions and circumstances of the colonists, see sections 8 and 9. Heath being a doctor, farmer, stockraiser, a man of influence and wealth and at the head of thirty families a grant in fee was made of a large tract and he as a colonist was put into possession of the same with right of legal ownership vested in him at the date of said concession. There were no conditions precedent in this grant. Like the petition in Aedono's, Heath said grant me in full dominion and absolute property fee simple a hacienda at the Bracito Acequia and I will locate there thirty families, stores, implements, etc., and his proposition was accepted and the grant made. This was not a concession with license or right of grant to be made thereafter as a premium for the number of families introduced. The vesture of title did not depend on any act to be first done by Heath, but the title not being reserved as in an empresarios contracts to be given as the families locate was vested in him at the time possession was given.

The Heath grant embraces 130 thousand acres of land. It is located in the Mesilla Valley in the southern part of New Mexico. Three subsequent grants interfere with and overlap this tract, covering some forty or fifty thousand acres thereof, leaving more than one-half unclaimed and unoccupied.

The grants are known as the Don Ana Bend Colony Grant, Mesilla Civil Colony Grant and the El Bracito Grant made to Juan Antonio Garcia and Hugh Stephenson for about fifteen thousand acres of land. This last grant is the only one that has ever been confirmed by the government of the United States, but its confirmation was subject to the prior right of others if any. No patent has ever been issued for the same. Some twenty years ago efforts were made to have those other two grants confirmed and patented, but congress refused to act in the premises and they now remain unconfirmed.

This grant in itself contains no condition either precedent or subsequent, yet the law under which it was made provided that if the land was not cultivated within two years the title would be voidable and the right of property would be considered renounced. This law of January, 1823, was passed under and the grant to Heath made during the reign of Iturbide. Immediately after the grant a revolution occurred and soon after Iturbide was shot and this law of 1823 repealed. Publication of the repealing act was made after June 17, 1823, more than two months after our grant was made, and by virtue of the laws of Mexico no statute or repealing act took effect until after publication. Therefore, our grant having been made prior to the promulgation of the repealing act, it is valid notwithstanding the repeal.

Immediately upon the grant of said land, Dr. John Heath went to the United States to procure his stores, medicines, implements of husbandry, according to the contract. This he did at the expense of $80,000, and taking them to Mexico, as provided, and on arriving on said premises found that the revolutionary government that succeeded the authorities that made him the grant forbid him remaining upon said premises. The Departmental Assembly having passed a resolution requesting the Ayuntamiento of El Paso in order to avoid responsibility for damages which Heath might claim if he brought his families to that country to notify Heath not to bring his colony to Mexico, further saying that the grant made to him by the Ayuntamiento aforesaid was made in haste and poor judgment for the reason that the law of January 4, 1823, was repealed.

The plaintiffs allege and showed by record and oral evidence that the said John G. Heath did comply with all the conditions, provisions, agreements and requirements of the said grant, and the law under which it was made as far as he was permitted to do so by the grantor, and that by reason of the revolution at that time in Mexico and the hostility of the subsequent officers of the government, the grantor, the settlement of Heath's colony and the cultivation of the soil were prevented, excused and rendered impossible, and that thereby the conditions subsequent of cultivation were released and the estate became absolutely vested in the said John G. Heath.

To establish these facts see depositions of witnesses, page 73 to 143 of the record. The reign of Iturbide was a *de jure* as well

as a *de facto* government, and was so recognized by the United States in March, 1822, and reciprocal political and commercial relations established between the two countries, December 14, 1822, Jose Manuel Zoyaya was received by the United States as Minister Plenipotentiary of Mexico.

Annals of Congress, No. 39, p. 2,099.
State Papers, No. 90 (17 Congress.), p. 56.
Niles' Register, Vol. 23, p. 209, 240.

This recognition was prior to the laws of 1823, and, being made by the proper political authorities, it cannot now be said our grant was invalid upon the allegations that the reign of Iturbidie was a usurpation. No denouncement of this title was ever made by the government of Mexico, as was provided by its laws, statutes and decrees in the case of forfeiture of grants for failure of cultivation of land, or other conditions subsequent. There was no abandonment by Heath of his grant, because his absence was not voluntary, but constrained, forced, banished by threat of arrest and imprisonment on the part of the grantor, which in no event could work a change of domicile, abandonment or loss of property. Therefore, we submit, Heath's title was valid, complete and subsisting when the sovereignty of Mexican government passed to the United States, and for these reasons the case should be reversed and our petition granted.

ASSIGNMENTS OF ERRORS.

1st. The United States Court of Private Land Claims erred in holding:

1st. That, as Heath's land lay outside of the four square leagues presumed to belong to the Spanish town of El Paso, its town council had no authority to make allotments or grants outside of said four square leagues, and, therefore, our grant was void.

2nd. In holding that Heath's grant was void because his family was not present when the grant was made and possession given.

3rd. In holding that the possession given to Heath of a tract of land known as the Bracito, five leagues square with its central point and all its corners definitely fixed, marked and located, was not a perfect grant, but only an allotment or concession which the authorities after revolution could deny at pleasure.

4th. In finding and decreeing that the said petition for the confirmation of the Private Land Claim known as the Juan Gid or John G. Heath grant, has not been sustained by satisfactory proof, and that the said title so asserted to the tract of land claimed to have been granted by the Ayuntamiento of El Paso, under the colonization law of Iturbidie of January 4, 1892, to John G. Heath is of no validity, and that the said grant or concession is not such

a one as the United States is bound to recognize and confirm by virtue of the Treaty of Session by Mexico to the United States.

5th. Erred in ordering and decreeing that the claims to the tract of land known as Juan Gid or John G. Heath grant, situated in the county of Dona Anna, in Territory of New Mexico, and being for a tract of land five leagues square, having for its central point the head of the Bracito Acequia, under a grant alleged to have been made on April 3, 1823, by the Ayuntamiento of El Paso to John G. Heath, under the name of Juan Gid, is hereby rejected, and said petition is dismissed.

6th. The court erred in not sustaining plaintiff's petition by decreeing that the tract of land described therein, known as the Bracito, being five leagues square, with the head of the Bracito Acequia as its central point, had been granted to said John G. Heath in April, 1823, by the town council of El Paso, under the law of January 4, 1823, and that the same should be confirmed as the property of his heirs, the petitioners in this case.

Argument and Authorities in Support of the Facts and Legal Propositions to Sustain Plaintiff's Claim.

FIRST POINT.

The grant to Heath was legally made; the Ayuntamiento had full power to grant and confirm titles to lands under the law of January 4, 1823, without the subsequent approval of the governor or department assembly, or the executive of the nation, the words of this act giving authority to the Ayuntamiento to make grants are similar, if not identical, with those of the act of January 4, 1813, and many grants made under this law have been sustained by the governments of Mexico and the United States, and in all these cases it was held that these grants conveyed a fee, and not a license or privilege of settlement only.

First Authority to Make the Grant.

The assignment of errors will be argued jointly in the six propositions we discuss.

The importance of this case, the land covered by the grant being very valuable, and there being many interesting questions of constitutional and international law involved, some of which are entirely new, the act of Mexican Congress, January 4, 1823, having been in operation only a few days, but few grants were made under it, and no case has ever reached the Supreme Court of the United States involving its construction—is our excuse for submitting to this honorable court such a lengthy argument.

Articles 4, 22 and 23 are the most important sections of the act of 1823 in giving the Ayuntamiento authority to make the grant; other articles will be referred to in their proper places.

Section 4.—Settlement of Families.—Families who emigrate, not included in a contract, shall immediately present themselves to the Ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

Section 22.—Right of Occupants.—The date of the concessions for lands constitutes an inviolable law for the right of property and legal ownership.

Section 23.—Cultivation.—If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; in which case the respective Ayuntamiento can grant it to another.

In the trial of our case in the United States Land Court at Santa Fe, New Mexico, there was a controversy as to the proper translation of Sec. 4 of the act of 1823. The learned counsel for the defendants sought to have adopted what is known as

MR. TIPTON'S TRANSLATION:

"Article 4. The families who come of themselves to settle shall present themselves *immediately* to the respective Ayuntamiento of the place which they desire to establish themselves, in order that, in conformity with the orders which they have from the executive, there be designated to them by that body the lands to which they are entitled, according to the industry which they are going to undertake."

The United States Land Court adopted our translation. This is *correct*. It is the translation found in White's Recop., p. 588, Hall's Mexican Law, Art. 256; Early Laws of Texas, p. 42, and Rockwell's Spanish Laws, p. 617, and is approved by all the Spanish jurists and scholars. It is substantially the translation made by Ensabio Chacon, official interpreter and translator of the court of paivate land claims. (See p. 32 of the record.) The chief difference in the interpretation is the translation given to the fourth line of Art. 4: "*Para que confirme a las ordenes, con que se hallen del Gobierno,*" etc. By a forced construction Mr. Tipton seeks to render these words into "in conformity with the orders which they have from the executive," while we affirm the correct translation to be, "in conformity with the instructions of the executive," etc., or literally, "in conformity with the orders which they *may find* from the executive."

The chief difference in these translations lies in Tipton's forced rendering of the word "*hallen*" which he interprets "to have" instead of giving its correct meaning "to find". The word "*hallen*" is the subjunctive present of the verb "to find" and the word "*hayen*" is the subjunctive present of the verb "to

have ", and is an entirely different word from " *hallen* " and Tipton uses the present tense of the word " hayen ", a different word from that in the text. The word " hallen " is never translated " to have ", but always " to find ", or some similar word. To support this we refer to a few translations in the treaties with Mexico, Spanish and American original Inter-National Treaties-Hanover and Mexico p. 19 " hallandolos ", translated p. 26 " found to be in due form ". Art. 11, Treaties of Guadalup, Sec. 3, " se hallen denter " " being within ". Sec. 1 Preamble, " hallandolos " " finding them ", and Sec. 4, " hallandolos " " to find ". Extradition Treaty 1861, Preamble, Sec. 4, " hallendolos " " found ". Treaty of 1831, Art. 16, " que se hallosen " " which shall be found ". Art. 21, " si se hallen en el " " if found therein ".

It is argued, and even suggested, by the court, that it was increditable that it should have been intended by the law to confer upon subordinate officers the power to dispose of the public domain to foreigners as they might choose. By referring to history this is explained. While Mexico was ruled by Spain this was true. Public Mexican Law p 27

In 1821 a revolution occurred and Mexico became a Republic: Prior to this the disposition of the King was to retain within himself the right to grant the public lands, but subsequently the policy of the Mexican government was to extend this right nearer to the people. It was thought that a local authority such as town council, where the land was situated would be an appropriate and trusty agent of the government to make grants for the reason that under the circumstances, they could best judge of the qualifications of the applicant as well as the necessities and advantages of the grant. In this view the act of January 4, 1823, was liberally made in the right and authority of the Ayuntamiento to grant and confirm titles to colonists without the approval of governmental authorities, but in all other features this law is similar to prior and subsequent laws. The authority of the Ayuntamiento to make grants in this act is the same as found in other decrees of the Mexican government.

" *A* " *this is a colonists grant and not an Empresario contract.*

Clearly two distinct species of grants are provided for by this law.

1. Empresario grants, which must have been made by the chief executive under certain conditions and regulations.

2. Grants to colonists, to be made by the Ayuntamiento or town councils of the respective districts.

These are the only authorities that have any right to make grants under this act, no other is therein spoken of. It was a complete law in itself on the subject of colonization. The power to grant does not depend in any way on other or previous laws. It stands alone, not referring to or connected with any other act.

Empresarios grants might not be in fee or absolute ownership of property in the first place. The amount to be received by the empresario depended as a premium upon the number of families

introduced. In such case the right of property was not vested until location, survey, possession and title were given. The empresario who was to introduce at least two hundred families, was to receive at the rate of three haciendas and two labores for each two hundred families so introduced. He did not in the first place necessarily receive a title of absolute ownership, that was generally given as a premium after the families were introduced. But we need not argue the character of an empresarios grant under this law. All that is necessary is to affirm and sustain that the act of 1823, provided for a grant to a colonist at once of a specific tract of land with the subsequent condition of cultivation, and not for a mere designation of a large tract of land within which a colony might be founded and established; after which the land to the colonist was to be allotted, and the premium lands to the empresarios measured off.

We believe a similar distinction between empresarios and colonists grants is to be found in this law itself, as is found in the subsequent laws of Coahuila and Texas, and the act of 1824, and subsequent regulations of 1828. By the first the empresario received no title to any lands until the terms of his contract had been complied with. On the other hand, the regulations of 1828, like the provisions of the act of 1823, making grants to colonists, contemplated the issuing of grants in the first place to colonists and empresarios. Political chiefs or governors were authorized to grant vacant lands to empresarios, families or individuals, making no distinction, as is found in the law of 1823, either in the character of the grants or as to who is to make them, or the several classes of persons to whom they might be made. But there is another distinction, between the law of 1823, and the subsequent laws, which is important to remember. The act of 1824 provides that grants made to individuals shall not be definitely valid without the previous consent of the territorial deputation; while grants made to empresarios for themselves to colonize with many families shall not be held definitely valid until the approval of the supreme government be obtained. No such provisions are to be fouud in the act of 1823.

This was nothing unusual, grants were made with or without approval, just as the law provided. From the 15th of October 1754, to the 4th of December, 1786, grants of land were issued by the audencios, and did not require the approval of the King.

See Public Domain 1883, p. 1,130.
How lands were granted in Spain and Mexico, by R. C. Hopkins.

Therefore, it is not surprising for the Mexican government to give this power to the Ayuntamientos, without approval.

The Ayuntamiento was to designate the lands to the colonists, to give to a farmer not less than one labor and to a stock raiser not less than one sitio, Secs. 4-7-9, and then by Sec. 22, it is expressly provided that the date of this concession constitutes an in-

violable law for the right of property and legal ownership. For six years from this concession the colonist was exempt from the payment of tithes, duties, taxes, etc., and by Sec. 29 the colonist was permitted to sell his property. The right of sale is the highest recognition of ownership in property sanctioned by law.

By article 4 the Ayuntamiento was to *designate* the lands to the colonist, while in act 3, the executive was to *designate* the lands to the empresarios. These provisions were in harmony and unison with act 2, that the executive will distribute land to them, UNDER THE CONDITIONS AND TERMS HEREIN EXPRESSED. "The conditions and terms herein expressed" were that to the empresarios he made the grant himself, while to colonists the grants were made through agents delegated, Ayuntamientos. This conclusion is irresistible when we consider the words of Art. 23, "in which case the respective ayuntamiento can grant it to another." The right to grant it to another is conclusive of the previous power to have granted it to the *other*, from whom it was to be taken, therefore construing the whole act to designate land to a colonist means: *to point out, to give, to set off, to grant said lands to him.*

Webster says that designate is from the Latin word designo, Spanish designe, the word used in the original, and means to mark out or show; to indicate by visible lines, marks or descriptions, to point out; to select or distinguish for a particular purpose, to assign. Approved in the Century dictionary.

It is similar to the word *destine*, and Judge McLane in the case of *U. S. vs. Phil., 11 How., 659*, held that destine meant "to set apart for or assign for a particular use in exclusion of all other uses," and hence meant to grant and deliver as property.

In Mexico no particular form of granting lands was necessary. Usually grants were made upon application of the party desiring the land directed to the authority authorized to make the grant, followed with approval of the petition and putting the party into possession of the same. In our case it was the ayuntamiento that was the proper authority to grant and put into possession. If not, why did the government keep the whole management and regulations of the settlement by empresarios in its own lands, but in regard to separate families who came under article 4, relegate to the ayuntamiento the regulation and settlement of the same. In article 3 it is expressly set out that the empresarios shall make contract with the government, but no such clause appears in regard to separate families. In the settlement of such importance as would be one of two hundred families, the government itself proposed to keep the direction. But for settlements of singular families or groups of families of less than two hundred it was left to the ayuntamiento to regulate and manage. If it had been intended that each separate family, or even that each group of families should make direct application to the general government, it would have been expressed in terms in article 4 as explicitly as in article 3.

Our argument is further supported by reference to Sec. 22

the law of 1823, where it is said: "the date of concession for lands is an inviolable law for the right of property and legal ownership." Undoubtedly in its most restrictive sense "to designate the lands," gave authority to the ayuntamiento to locate, point out and put the colonist into possession.

Concession in Sec. 22, evidently refers to designation to be made by the ayuntamiento in the 4th section. No other title to a colonist is referred to in this act. These sections when taken together with other parts of the act evidently meant juridical possession, which completed or perfected titles, and gave to that body not only the right to "*regrant*" but to grant land to colonists in the first place. Concession gave a perfect title. No title in Mexico could be perfect or complete, "no right of property or legal ownership" could exist there without juridical possession. To the colonist that was to be given, by the ayuntamiento. Under the law of 1823, the colonist had no other source or title.

In the case of Malarin *vs.* U. S., 1st Wall., 290, it is said:

"The juridical possession is not designed, merely, to measure, and definitely identify the land granted, as it is claimed by plaintiff, but it was a formal act by which possession was delivered and title passed, and finally became perfect in the grantee. The judge went upon the land and after measuring it, when necessary, to identify the land granted, directed the grantee to enter into possession, which he did, and"

gave evidence of the fact by pulling up grass and making demonstrations as owner of the land.

In Graham *vs.* U. S., 4 Wall., 261, the court says:

"The Mexican law as well as the common law made formal delivery of possession or *livery of seizen* of the property *essential* after the execution of the grant, for the investure of the title."

Van Reynegan *vs.* Bolton, 95 U. S., 35.

As no title could be complete in Mexico without possession and concession being fixed by this law as to "inviolable law for the right of property," it must follow that the concession the colonist obtained was a title and possession he got from the ayuntamiento. From the quotations given above of sections 4, 22, 23, it appears that it was the intention to delegate to the town counsel the power to alienate the title and lands to prospective settlers by grant; and by the language of section 22, where reference is made to said grant as being a concession, it refers to said word as being used in a sense synonymous with the word "designate" as contained in section 4 of said act, and they all contemplated the power to make the grant, is conclusive from the language of section 23, which provides that if, after two years from date of concession, the colonist should not have cultivated his land gotten under the designation in section 4, then that said municipal body shall have power to "*regrant*," which carries with it absolute and uncontradicted power to grant originally.

The points we argue have been settled by good authority.

The Supreme Court of Texas has held that the ayuntamientos, under the law in 1823, had extensive authority in relation to granting and revoking titles to land. In the case of *Heirs of Hollowman vs. Peebles, 1 Tex., on pages 697–698*, Judge Hemphill, speaking of the obligations and functions of the ayuntamientos and referring to the first chapter of the law of the Cortez, June 12, 1813, *Collan de los Decretos, p. 86*, says:

"But in its last section the ayuntamientos are charged, in addition to their other obligations, *with all other subjects entrusted to them by laws, regulations or municipal ordinances.*"

Then quoting Secs. 4 and 23 in the act of January 4, 1823, as above, adds:

"*From these articles there can be no doubt that extensive authority was vested in the ayuntamiento in the issuing, granting and revoking, and regranting titles to land under the colonization law of 1823.*"

This learned judge further refers to the act of 24th of March, 1825, of the State of Coahuila and Texas to determine the power of the ayuntamientos. This becomes important to us when we remember that the power of the respective political authorities, under this act, could make grants only

"in conformity with the existing laws on the subject, *under the conditions that precedings shall be passed to the government for its approbation.*"

We find no such provisions in the law of 1823, hence we concluded that our grant needed no subsequent approval of the government, and that the act of sending it to the departmental governor was useless, unnecessary and void.

"B"—Difference in laws of 1823 and 1824.

The distinctive features of the law of 1824 and the regulations of 1828, when compared with the short, direct and positive terms of the act of 1823 show the ayuntamiento had power to make grants without the subsequent approval of the governor or the provincial deputations. If not so, why was the congress of the nation so particular to embody in the latter law such direct and positive requirements of the kind, as we find therein: that concessions made by the governor should not be made definitely valid unless approved by the departmental assembly? And in case its approval was not obtained the governor was to report to the supreme government for its decision; while grants made to the empresarios were by the 7th regulation not to be held as definitely valid until the approval of the supreme government was obtained. But no such provisions are to be found in the law under which we took our title. It was in accordance with the ordinary policy of the Spanish and Mexican governments to invest the

administration of local affairs to local subordinates, by whom the will of the supreme government was carried into effect in the grant of lands: In the law of 1823 the right to make colonization grants was lodged in the executive and ayuntamientos without any provisions of subsequent approval, but this was soon repealed and supplemented by the law of 1824, giving the power to the governors, with the subsequent approval of the departmental assembly and the supreme government. Both laws were legal, and it was only a question of WHEN AND HOW the will of the executive was carried out. In the one case, by the direction of the law and the will of the executive the ayuntamiento exercised the power to grant absolutely, while in other, the power was lodged in the governors subject to approval. In other words, with the will of the executive, the ayuntamiento, by the act of 1823, was appointed the agent to make colonization grants. It was within the policy of the Mexican government to make grants through the chief executive, either direct or by delegated authority. And this authority was often delegated by the chief executive himself, sometimes by the nation.

This delegated authority was always exercised in Spain or Mexico by the governors, ayuntamientos, pueblos, local commissions, etc., and in each instance it was the act of the chief executive performed through his authorized agents. The laws of 1823 and 1824 make a distinct, positive and different delegation of authority. In the first, with the instructions of the executive, the ayuntamientos were to make grants of land to colonists, while in the other, the power was given to the governors with the provision that no grant was to be definitely valid without the approval of the departmental assembly and the chief executive.

This distinction may be further recognized by examining the law of Coahuila and Texas of March 24, 1825. These and all other laws of Mexico, except the act of January 4, 1823, expressly provide that all grants made by governors or authorized authorities are to be approved by the government. Yet it is held in all such grants that title and possession given under these laws is not defeated by want of approval of the departmental assembly; that nothing short of the negative action or refusal of the chief executive will have the effect of destroying the title received.

Then why is not our title good and perfect, received under a law which required no concurrence or approval of the action of the ayuntamiento, the granting power, or the agent thereof? This proposition is further sustained when we perceive that there is nothing in the act of 1823 or any of the statutes or laws of Mexico, as well as nothing to be found in the proceedings of our title, which authorizes or requires the departmental governor or assembly to act jointly with the ayuntamiento in making our grant.

We admit that if this had been a joint power, being exercised only by one, our grant might be void.

The power the ayuntamiento had was not under statute to be exercised jointly with the governor and departmental assembly.

To require this would have been a repeal of the law, and to have substituted a new one in its place. This could only have been done by the act of the supreme government. No such law or decree to this effect is shown.

The petition was directed to the ayuntamiento, and it alone had the right to determine whether the grant should be made and the title papers issued. This it adjudged affirmatively and issued the grant, made the survey, and put Heath into possession.

If this grant had been made under a special dispatch in which the ayuntamiento, the departmental governor and assembly were to act jointly in making the grant, then a different result would have been had. In such a case an affirmative adjudication could not have been legally made, without the consent of the departmental assembly and governor. But we have no such a record in our case before this honorable court. Our grant was made with authority of law, and cannot be defeated by any unwarranted, unauthorized and illegal requirement of subsequent approval. In our case approval was not required by law, and therefore unnecessary.

U. S. v. *Castellero*, 23 How., 464.
U. S. v. *Osio*, 23 How., 273.

"C." The grant was made to Heath individually and not to the families with him as beneficiaries and for this reason was not an empresario contract. The parties he brought were included as one family, and were referred to only as inducement for the enlarging of the grant.

That the grant was properly made to Heath individually and that the families whom he was to bring, were to take the lands through him and not through the government direct, is clearly shown by the contract and the law. It was said in the decree that the proprietorship was to be in Heath, and that those who were to settle on the Bracito were to contract with him. He was the *proprietary* of this land as William Penn was during the colonial government of Pennsylvania, having the fee and the free disposal of all said lands. *Bouvier's Law Dictionary, p. 588.* This was warranted by the law of 1823. There was not one word in it or in the grant that directs the ownership to be given to the families Heath was to locate. And it is settled there is no limitation in the law against confirming in one final title lands intended for two or more.

White v. *Holliday*, 11 Tex., 304–308—605–614.
Hatch v. *Dunn*, 11 Tex., 708.

The fact that Heath promised to bring to this land thirty families does not make this grant an empresario contract. These families were not to take interest in the land as distinct additional beneficiaries, but were referred to in the petition only as inducements for enlarging the bounty of the government to Heath. His

petition asks for this grant to himself and it is given in such form as not to convey any interest in the land to any other person. It is expressly provided that if any one wishes to settle on the Bracito, he must make arrangements with Heath. From this it was left with him to make such arrangements with the families he brought as would be in conformity to law and the best interests of the parties concerned. Here no beneficiary interest was created by the grant in these families but the fact that Heath was to bring them there as part of his family or servants and over whom he had control with intent to form a colony, gave the ayuntamiento jurisdiction to augment the grant and make it as large as it did. These views are clearly sustained by authority.

Berreyesa v. *Schultz*, 21 Cal., 513.
Ferris v. *Coover*, 10 Cal., 589–592.
U. S. v. *Sutter*, 21 How., 170.
U. S. v. *Weber*, 1 Hoffman, 126.

These were colonization grants made "to the petitioners and other families." In the 21 Cal. case, the father, mother, brothers and one hundred Indians constituted the family of the petitioners, and the petition asked the grant for the benefit of themselves and the persons with them, and it was held:

1st. The petition and report of the secretary upon it showed that the parents, children and brothers were referred to only as inducements for the enlarging of the bounty of the government to the petitioners, and not as distinct additional beneficiaries.

2d. That the recital in the grant did not control the course of the title; that it only disclosed the inducements which operated upon the governor to make the grant, and that the language of the operative clause entirely excluded the idea that any other person than the two Berreyesas who petitioned were to become vested with the title.

3d. That Jose and Sisto Berreyesa, the grantees, were invested by the grant with the full legal and beneficial title to the land, exempt from any trust in favor of the other members of the family.

Again, the grant to the empresarios was not forfeited until the end of twelve years, while the one to the colonist might be in two years. From these provisions it was manifest that the right to grant land was not alone to be exercised by the executive or government, while it is equally clear that by the words of the 4th section "the ayuntamiento may designate the lands," and the language of section 23, "in which case the respective ayuntamiento can grant it to another," it is conclusively proved that the ayuntamiento is the authorized authority referred to.

Here the location of the thirty families was not a condition precedent or subsequent. In this the grantor relied upon the promise of the grantee, the vesture of the title in no way depended

upon its fulfillment or non-fulfillment. This is very similar to the grant made to Arredondo. In that case the petition stated "that as an inducement to the Spanish government to make the said grant to Arredondo and son, they had offered and stipulated to establish on the land two hundred families in the event of said land being granted to them in full dominion and in absolute property; which offer was accepted by the Spanish government, it requiring that the families should be Spanish. The grant was made in absolute property, subject only to the conditions that the grantees should begin their establishment in three years from the date of the grant."

United States v. *Arredondo*, 6 Peters, 696.

This was a colonization grant made upon conditions which were not complied with in fact. Yet it was held by the court that these conditions were subsequent, that the title vested upon the delivery of the possession and as a matter of law such facts were shown as dispensed with the performance and divested the grant of the conditions subsequent. We submit that this is precisely our case, as we will show in our argument on the question of forfeiture. The case of Arredondo was ably argued and carefully considered by the court. It has been affirmed and re-affirmed and is now well established law.

Interstate Land Co. v. *Maxwell Land Co.*, 139 U. S., 569-590.
McMicken, v. *U. S.*, 97 U. S., 204-216.
Hall v. *Russell*, 101 U. S., 509.

Contrary to these and many other decisions, the court erroneously ruled giving as the chief reason for dismissing our petition, "that the power conferred upon the ayuntamiento was to grant lands to families who had emigrated, and who presented themselves for settlement. Absolutely no power was conferred to make grants to individuals who went into the country without families or in advance of them; and that was Heath's condition when the grant was attempted to be made. He had come alone into the country. *Let it be conceded that the body had the power to designate the lands which should be given to him when he should return to the country bringing his families with him, but until that condition should happen there was absolutely no power in the body to confer upon him any rights with reference to the lands*," further suggesting that all Heath obtained was only a privilege of emigrating to the country and settling on the land designated to him, provided there was no change in the policy of the government.

This is not the law. The opposite is the well established principle settled by decisions of the universal practice of the Mexican government under its colonists laws. In Mexico the word family did not mean wife and children only, but included domestics, servants, attendants, etc. *Hatch* v. *Dunn*, 11 Texas, 708.

And it is held, actual residence in the country previous to making colonial grants has never been necessary to the validity of the title under any of the colonization laws. The colonists were allowed a term prescribed by law to comply with the conditions annexed. And lands intended for two or more colonists may be included in one title.

White v. *Holliday*, 11 Tex., 606, 616.

It is clearly settled by high authority that the ayuntamiento having been appointed by the government to determine who were entitled to lands as "colonists," its duties in this respect were judicial and its decision final. It was for them to determine whether Heath possessed the qualifications requisite to entitle him to the bounty of the government, and also whether it was wise and prudent to make this grant, and it is settled that their decision upon the subject is final and can not be reversed by the courts.

U. S. v. *Vigil*, 13 Wallace, 449–451.
Johnson v. *Smith*, 21 Tex., 722–728.
Bowmer v. *Hicks*, 22 Tex., 155–162.
Russell v. *Randolph*, 11 Tex., 460.
Horton v. *Brown*, 2 Tex., 79.
Brown v. *Hicks*, 23 Tex., 156–162.
Byrne v. *Fagan*, 16 Tex., 392-395.
White v. *Burnly*, 20 How., 235.
Choteau's Heirs v. *U. S.*, 9 Pet., 147; affirmed in *McMicken* v. *U. S.*, 97 U. S., 215.
Vance v. *Garland*, 101 U. S., 514.
Marqueze v. *Frisbie*, 101 U. S., 475.

In *Johnson* v. *Smith*, 21 Tex., 722, on page 727 it is said:

"In the case of *Russell* v. *Randolph*, 11 Tex., 460, it was shown that it was the common practice of the commissioner, sanctioned by a high law officer of the government, to issue titles to applicants whose families had not, and were known by the officers not to have arrived in the country."

In affirming this case in *Brown* v. *Hicks*, 22 Tex., 162, the court said:

"A grantee possessed all the requisite legal qualifications to entitle him to the grant, and that the grant itself concludes all after inquiry upon that subject, has been repeatedly decided. This precise question was decided in the case of *Johnson* v. *Smith*, 21 Tex., 722, where it was held that evidence cannot be admitted to prove that the grantee had not brought his family to the country and had not in fact become domiciled here for the purpose of showing that he was not entitled to the grant."

To same effect:

Styles v. *Gray*, 10 Tex., 503.
Hardiman v. *Hobart*, 11 Tex., 656.
Hatch v. *Dunn*, 11 Tex., 708.
Ruis v. *Chambers*, 15 Tex., 590.
Howard v. *Colquhon*, 28 Tex., 136.

It will not do to say that the grants in these cases were made under colonization laws subsequent to 1823, and were therefore not applicable to our case. In *Russell* v. *Randolph*, 11 Tex., 114-468, quoting the case of *Holliman* v. *Peebles*, 1 Tex., 678, which was a grant under the law of 1823, the court said that this case affirms the fact

> " that it was the practice of the government at that time to make grants to colonists whose families were not then in the country. That it was not an indispensable requisite of this law that the families should actually be with the applicants as a condition upon which titles could be given, and that grants thus made were not void either on account of fraud or want of legal authority the family was constructively with him."

While these decisions are not binding, yet they are almost, if not absolutely persuasive, being rendered by an honorable court when the laws were in operation with full knowledge of the facts and surrounding circumstances. This was the practice adopted and the construction placed by the officers of the government upon the law. At this late date the correctness of that construction is not open to revision.

> *Johnson* v. *Smith*, 21 Tex., 727; 15 Tex., 590; 16 Tex., 398; 7 Tex., 384.

This being true, the argument of the learned court fails and there is nothing left except the equally erroneous proposition that, as the town council could not grant lands outside of four leagues, and the lands being beyond that limit, our grant was void. We were surprised at this ruling. It shows a confusion and misunderstanding of the Mexican law and the points in the case. We have always admitted that our lands were without the four leagues from El Paso, but that does not affect the questions in our case. The law of 1823 was the general National colonists' law of Mexico; it dealt with the public lands and not with those of the state or municipalities. What lands belonged to, or whether or not four square leagues were assigned to all Pueblos, is not a question in our case. This question has been recently decided by this honorable court. (See *U. S.* v. *Santa Fe.*)

This statute does not pretend to deal with such lands. If the law gives to the town councils the right to make grants, as we contend it does, it was certainly erroneous to limit that authority to the grant of lands within the four square leagues, as the United States Land Court did do. This law being national and dealing with the public lands of the nation, it was erroneous for the court to rule, " in our judgment the power conferred upon the Ayuntamiento by decree, with reference to foreign emigrants, was simply to allot to them lands within the town grant," and that if the town councils had power to make grants outside of the town grant, then that body could act in making allotments only in quantities prescribed by existing laws and regulations giving allotments

within the town grant. Here the court concedes the power to make the grant as we argued, but because they could not apply this authority to a wrong subject-matter, our petition was dismissed. This law was a law unto itself. The authority given to the Ayuntamiento was not limited or restricted by anything contained in former laws. Under the fourth section the Ayuntamiento, which had the power to grant, was the one nearest to where the land lay; its jurisdiction was not limited by distances, but by circumstances. The jurisdiction of El Paso to make grants under this law of 1823, extended to San Diego, because at that time there were no other organized Pueblos west between there and the Pacific coast. The jurisdiction referred to in Exhibit "A." page 169 of record, and page of argument, means the the right to decide and determine as to the making of grants, and does not mean that the land and all the territory to San Diego belonged to El Paso as a municipal domain or ownership; therefore, the first reason assigned by the court for the dismissal of our petition that our grant was not of the town lands of El Paso, and was therefore void, cannot be sustained. In the court below the learned counsel argues at length, in second point, that:

"*The grant was of the town lands of El Paso, and therefore void.*" In determining the power to grant, the fact that our land was not within the four leagues of El Paso, had nothing to do with our case. Although it was one of the reasons assigned by the court for dismissing claim. It is singular that the learned counsel for the defendant should argue that our title was void because our grant was of the town lands of El Paso, and the court decided that our title was void because the lands were not the town lands of El Paso. The truth of the matter is, that question has nothing to do with the rights of the Council to make grants, the law of 1823 dealing only with public national lands the learned counsel in discussing their first point in the court below, and we presume they will use the same argument here, asserted that the grant to Heath was unlawfully made; that the Ayuntamiento had no authority to make the grant under the law of 1823, for the reasons that as they claim our grant was an empresario's grant and not a grant to Heath as a colonist, as we argue, and in support of all this they allege that Heath directed his petition to the Emperor of the Nation and not to the Town Council of El Paso, and that it was the Executive and not the Ayuntamiento who was asked to concede to Heath's prayer. This proposition runs through the whole of their argument on first point. They say: "Heath's petition is addressed to the Emperor, and properly so under the provisions of the law." We submit this proposition *is false in fact and erroneous as a conclusion of law.* "Your Excellency" does not mean the Emperor or the Executive of the territory, but meant the town council or the chief officer of that body; this is the inevitable conclusion from the grammatical construction of the first sen-

tence of Heath's petition. He says: "I appear before Your Excellency," and not having received any reply to the petition, I laid before the Ayuntamiento, *your predecessor*. Here "predecessor" necessarily refers back to "your excellency." Again, "His Imperial Majesty" are words by which the Emperor is addressed. The Ayuntamiento is called "Its Excellency," and it was resolved to continue the execution of the decree of the 15th instant, made in compliance with the first action of *its excellency*. Surely Heath had a right, then, and did address the Town Council as "Your Excellency," and the learned counsel's proposition that Heath's petition was addressed to the Emperor, and properly so, that it was under Section 3, and not 4, of the law of January 4, 1823, and was therefore an Empresario grant and not to an individual colonist, must fail. They have misquoted and wrongly interpreted the letter and spirit of our grant.

It is argued that the expressions in our expediente such as the promise of Gid to bring to the settlement of the Bracito thirty families of Catholic Christians, that said settlement be annexed to the parish of this jurisdiction, that he would bring stores, ammunition, etc., tends to show that he was asking for a tract of land for the purpose of establishing a settlement and not for the grant of a tract of land to himself individually as a colonist. Now, this must be determined from the law and what was done in the premises. The grant might have been made to Heath and others, but it was not. It is to him individually. Nothing in the papers indicates anything to the contrary. True, he promises to bring to the Bracito thirty families, but this is not a condition precedent. The Nation relied upon his promise in this particular. It is provided that this land at the Bracito is his, and that any one coming to it must make an arrangement with him. These thirty families had no ownership in this land except what they would get from Heath. His promises might have been an inducement for the Council to make the grant as large as it did, but a fulfillment of these promises was not made a condition precedent. When he promised he required expressly that the land be given to him, not to himself and others, and this is the way the expediente was executed. Just precisely as it was in Arredondo's case.

"There, as an inducement to the Spanish Government to make a grant to Arredondo and son, they offered and stipulated to establish on the land two hundred families, in the event of the said land being granted them in full dominion and absolute property; which offer was accepted by the Spanish government, it requiring that the families should be Spanish. The grant was made in absolute property (as in our case) subject only to the conditions that the grantees should begin their establishment in three years from the date of the grant."

U. S. v. *Arredondo*, 6 Peters, 697.

"D."

Sections 8, 9 and 22 authorized the Ayuntamiento to make the grant to Heath as large as it did, and the land conveyed was not a "float" but a title in fee.

THE AMOUNT OF LAND TO BE GRANTED NOT LIMITED BY LAW.

It can not be said that the authority of the Ayuntamiento was limited as to the land it gave to a colonist. The maximum amount to be given to a colonist was not as under other laws limited, but the minimum quantity was; the amount of land given might be augmented if deemed proper, agreeably to the conditions and circumstances of the colonists. Sec. 9.

Therefore, there was nothing in this law to prevent the town council from giving Heath himself, as a colonist, one or more haciendas. They alone were to judge of the merits, conditions and circumstances of Heath as a colonist and their decision can not be inquired into. See page 57 of this argument.

The defendants say that Heath applied for and the Ayuntamiento intended to give one hacienda, while the land claimed is five haciendas, and that the petition does not show authority to make such a large grant.

We submit that neither the 8th article nor any part of the law of 1823 limited the quantity of land to be given to a claimant by the council. We deny that Heath asked for or that the Ayuntamiento granted him a hacienda only. True, in some parts of the proceedings they may use the general term hacienda, but there was no uncertainty as to the granting part of the contract as to what was conveyed. It was a tract of land taking the head of the Bracito acequia as the central point of a square, two and a half leagues from the river, and the same on the sides formed by the square, that is, a square of five leagues or twenty-five thousand varas on a side. See Exhibit A, page ~~13~~ 6

This was followed by survey and possession according to this decree, accompanied with a map, all of which was affirmed, approved and adopted in the subsequent proceedings, showing just what the Ayuntamiento granted or intended to grant to the said Heath. The concession and survey agree, and fix the amount of land he took by the grant.

Hacienda, in its general meaning, is a farm, a residence, an "estate." (Blackmar's Spanish Institutions of the south-west.) Therefore the grant made is not limited to a hacienda, simply by the use of the word, when the judicial possession, the survey, courses and distances, corners and natural boundaries all show that the council intended to and did grant more than one hacienda. Boundaries and actual locations when in conformity to the particular descriptions of the deed fix the amount of land granted. Again, a general description by the use of a word or phrase, as in this

case, hacienda, must yield to the particular descriptions—"a square of five leagues on a side, with the head of the Bracito acequia as the central point." If error exist in courses and distances and other descriptions in a grant, they must give way to monuments and physical boundaries.

Higueras v. *U. S.*, 5 Wall., 827.

Therefore if the land thus described should be five haciendas instead of one, we take what is there given by our deed and judicial possession, and are not limited to one single hacienda by the accidental use of the general term, which is not a description of the granting part of our title. The point we argue is clearly sustained by authority. In a recent case, Justice Miller said:—"The whole of this subject is very well considered and explained by Justice Field, in the opinion of this Court, in the case of *Hornby* v. *United States*, 10 Wall., 224. He says:

"As we have had occasions to observe in several instances," (referring to *Higueras* v. *U. S.*, 5 Wall, 828; *Alviso* v. *United States*, 8 Wall., 339) grants of the public domain of Mexico made by governors of the Department of California were of three kinds. 1st, grants by specific boundaries where the donee was entitled to the entire tract described. 2d.—Grants by quantity as one or more leagues situated at some designated place or within a larger tract described by out boundaries, where the donee was entitled out of the general tract only to the quantity specified;—and 3d—Grants, of places by name, where the donee was entitled to the tract named according to the limits as shown by its settlement and possession or other competent evidence."

It is entirely clear that the grant to Beaubian and Miranda was a grant of the first class by specific boundaries, where the donee was entitled to the entire tract described. *There is nothing in the language of the Grant, nor in the petition, nor in anything connected with it, nor in the act of judicial possession, to indicate that either governor Armijo or Beaubian and Miranda, or the officers who delivered the judicial possession to them, had any idea or conception that the grantees were not to have all the land within the boundaries established by that judicial possession.* Hence the idea of counsel that there were only twenty-two square leagues, or 97,4248 acres granted within this great boundary is entirely unsupported, the case not being one of a grant of a more limited quantity within a larger outboundary."

Maxwell Land Grant Case, 121 U. S., 325–372.

Clearly our case comes within the first class of grants, being one of specific boundaries with marked, designated and fixed lines and corners, we "*are entitled to the entire tract designated.*"

That the council had authority to make the grant this large is fully sustained by sections 8 and 9 of the law. That this was a matter of discretion over which it was the sole judge, and into which this Court can not inquire, is fully sustained by authority. In Arredondo's case, 6 Peters, page 747, the court says:

"It has been objected to the validity of the grant that it exceeds the quantity authorized by the laws of the province. That he (the intendent) had power to make the grant, the terms and extent of which were within his discretion, the proper exercise of which this Court has neither the power nor right to judge."
And authorities cited above.

Again in the case of *U. S.* v. *Pico*, 5 Wallace, 536–539, Justice Field used the following language:

"Were there any doubt of the intention of the government to cede all the land contained within the boundaries designated by him it would be removed by the judicial possession delivered to the grantees. This proceeding involved an ascertainment and settlement of the boundaries of the land granted by the appropriate officers of the government specially designated for that purpose, and has all the *force and efficacy of a judical determination. It bound the former government and is equally binding upon the officers of our government.*"

Affirmed in *More* v. *Steinback*, 127 U. S., 70–9.
Van Rynerson v. *Bolton*, 95 U. S., 33-36.

The authority of the council, Art. 9, to "augment said portions of land as may be deemed proper agreeably to the conditions and circumstances of the colonists," presupposed the authority to judge of the qualifications of the applicant, and its judgment and action is binding. That was a question confided by the law to the judgment of the council in this case, and it is unquestionable that its decision upon it is not now subject to revision by this court. With as much propriety might we sit here to revise the action of the authorities in granting a league rather than a labor under the 14th Article of the law, or to inquire into the sufficiency of the evidence upon which the empresarios or commissioners acted in making a grant in any case. It is scarcely necessary to say that such inquiries would be as unprecedented as they would be unwarrantable.

Jenkins v. *Chambers*, 9 Tex., 167–228–9.
Choteau's Heirs v. *U. S.*, 9 Pet., 153–4.
United States v. *Arredondo*, 6 Pet., 729.

Could there possibly be any shadow of doubt as to whom the Bracito was granted and just what land was conveyed, the survey and possession given fixes the matter. Under the Mexican law when the survey took place accompanied with possession, title immediately accrued.

Rutherford v. *Green's Heirs*, 2 Wheat., 196.
Gonzales v. *Ross*, 120 U. S., 626.
Fremont v. *U. S.*, 17 How., 541–2.
Waterman v. *Smith*, 13 Cal., 414.
Hancock v. *McKinney*, 7 Tex., 383.

Delivery of judicial possession had a double operation. First, to make a formal delivery of seizure of the property, and second to measure off and designate the specific quantity and establish its

boundaries. These proceedings involved a definite ascertainment of the land to be delivered, and for that purpose a survey and measurement; in other words, a locating of the land.

Carondelet v. *St. Louis*, 1 Black, 179–189.
Van Reynagen v. *Bolton*, 95 U. S., 35.
U. S. v. *Borsdire*, 11 How., 86–87–90.
Huse v. *Clark*, 18 Cal., 574; 21 Cal., 579.
U. S. v. *Choteau's*, 9 Peters, 147–154.

After possession delivered, what was previously a grant of quantity became a grant of a specific tract.

Graham v. *U. S.*, 1 Wall., 259–261–2.
Malarin v. *U. S.*, 1 Wall., 289.

We submit that by our expediente, by the map or draft, and by all the proceedings in the case, placing us in full possession of the whole survey actually made of a square piece of ground of five leagues on each side, with the head of the Bracito acequia as a central point, we took title to all land thus surveyed, no matter if it was one or five haciendas. But the learned gentlemen argue in this second point, "assuming the grant to have been a valid grant, it was only for an hacienda." For that reason our grant is a "float." They do not say this in words, but it is what their argument means. It would have been too absurd to have used this term. They say our grant is not one of specific boundaries, but one of quantity, lying within a larger tract described by out boundaries, what in law is known as a "float." The gentlemen forget that the quotation from Exhibit A, "they may locate their hacienda" was used by the Council in their decree before the land was surveyed and located, and does not apply to a location to be made in the indefinite future of a hacienda within the out boundaries of a larger tract. Nothing in our grant shows that an hacienda was to be surveyed off in the future by the officers of the vicinage, and the surplus reserved for the use of the Nation. Mexico never made two surveys and gave two judicial possessions.

Frasher v. *O'Connor*, 115 U. S., 102–107.

It is absolutely certain that the term hacienda was used in its general sense as a farm or possession. There was nothing in the law of 1823 that limited grants to colonists to one hacienda; the grant could embrace five or more. The concession, possession and survey fixes the land Heath got. Exhibit A. "The head of the Bracito acequia shall be the central point of the square of the said tract; that is to say, two and a half leagues from the river, and the same on the side formed by the square." Exhibit H. "The Bracito tract to be five leagues of each course, the whole composing an hacienda." This is the land granted and into *full possession of which Heath was placed*, and yet the learned counsel argue that our grant was not one of the first of the three kinds of Mexican grants, namely, grants by specific boundaries, where the donee

is entitled to the entire tract, whether it be more or less; but that it was of the second kind, grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, when the donee is entitled to the quantity specified and no more; or in other words that Heath did not get the five leagues with the head of the Bracito as its central point, which was surveyed, marked, designated and set apart to him and *into full possession of which he was placed*, but only got the promise of the Mexican government to give him an hacienda or 21,140 acres to be located somewhere within the vicinity of the Bracito acequia, this never having been done and the Mexican government having subsequently located three grants at the Bracito, the latter had a prior or better right than Heath, although his title might have been made according to law. The counsel quote several cases with which we have no controversy as to the points of law decided, we claim they are not applicable to our case. We admit that they and other decisions do hold that a grant of a quantity of land, not fixed, located, surveyed or set apart, or described further than being within a larger tract, described by what are called out boundaries, may be postponed or defeated by a subsequent grant, survey, location and possession of the same land to another. We submit our grant was not one of this kind. It belonged to the first class of Mexican grants. Its boundaries were specified, definite and certain. Its central point was fixed, so were all its lines and corners, a square of four leagues on a side. Read Exhibit G, copy of proceedings of possession to see what land Heath took (page 160 of record, and of our argument.) The commission proceeded to this place, where "in accordance with instructions, taking the head of the Bracito acequia for the central point of the estate into possession of which Juan Gid was to be placed," whereupon a tree was cut: "Haza de Dr. Juan Gid," farm or possession of Juan Gid. They then proceeded to make the survey, establishing marks, stones and corners at different points, and when finished Juan Gid was asked "whether he was satisfied *with the whole survey made of the land into full possession of which he was to enter under the colonization laws.*" And then a map was made and attached as a part of the expediente showing the central point, lines, corners, etc., of the survey. and yet it is argued that this grant is a float, and can only be located by this court on land in the out boundaries "not subsequently granted or otherwise disposed of by the Mexican Government and that of the United States." Surely the principles invoked and the decisions quoted do not apply to our case. A grant fixed, marked, located and designated like ours was, can "float" nowhere except in the vivid imagination of the learned counsel. The learned counsel are mistaken in denying that our case does not come within the first class of Mexican grants, and in stating "that this grant was of the second kind admits of no dispute"? Did the grant not have a central point and "specific boundaries." Then under the decision they quote, why is not the donee "entitled to the entire

tract, whether it be more or less," than a hacienda? In all Mexican grants the question as to whether it belongs to the first or the second class; a fixed survey or a float, must be determined from the words of the grant and the possession given. All the authorities sustain this proposition. In the case of *Henshaw* v. *Bissell*, 18 Wallace, 262, it is said:

"With the breadth of the tract stated, the quantity limited, the southern and center lines designated, all the essentials are given to a complete identification of the land. *A grant of land thus identified, or having such descriptive features as to render its identification a matter of absolute certainty entitles the grantee to the specific tract named.*"

In the case of *Miller* v. *Dale*, 92 U. S., page 478, the court, commenting upon the case of *Henshawe* v. *Bissell*, said:

"The question there is not as to which of two floating grants carried the premises, only one of the grants then under consideration was floating. The other grant had specific boundaries, or such descriptive features as to render its limits easily ascertainable. And the court held that the right of the grantee to the land thus designated could not be interfered with by the donee of a floating grant. *A grant of that specific description necessarily carried the land described, unless appropriated by an earlier grant; and no subsequent location of a floating grant upon the premises could impair the title.*" *In certain parts of one of the cases quoted by the counsel, page 12 of their argument, it is said: "It is entirely clear that the grant to B. and M. was a grant of the first class by specific boundaries where the donee is entitled was the entire tract described. There is nothing in the language of the grant, nor in the petition, nor in anything connected with it, nor in the act of judicial possession, to indicate that either Governor Armijo or Beaubian and Mirando, or the officers who delivered the juridical possession to them, had any idea or conception that the grantees were not to have all the land within the boundaries established by that juridical possession. Hence, the idea of the counsel that there were only twenty-two square leagues or 97,624 acres granted with these great boundaries is entirely unsupported, the case not being one of a grant of a more limited quantity within a larger boundary.*"

Maxwell Land Grant Case, 121 U. S., 325–372.
U. S. v. *Pico*, 5 Wall., 539.

It cannot be denied but that the Council intended to give to Heath the land surveyed to him—a square piece of land of five leagues on a side, into full possession of which he was placed, no matter if they might have erroneously called it an hacienda. This is what was done, as well as what was intended. Had they been locating a mining claim, it could not have been done with more certainty and exactness. Although mining claims must be distinctly marked, it is held: "The law is certainly complied with whenever stakes and monuments are placed upon the ground that the boundaries can be traced without any practical difficulty. The

object of the law in requiring the location to be marked on the ground is to fix the claims, to prevent *floating or swinging*, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue.

Book v. *Justice Mining Co.*, 58 Fed., 106–114.
Gleson v. *Mining Co.*, 13 Nev., 442.

"E." As matter of fact and law our grant was made with the knowledge, acquiescence and instructions of the chief executive of Mexico, and the grant itself is *conclusive evidence of this*, and is also *prima facie* evidence of the authority of the Ayuntamiento to make the grant.

That the executive had knowledge of our grant, acquiesced in and confirmed the same, and that the Ayuntamiento made the grant to Heath under the law of 1823, with the knowledge and instructions of the executive, is abundantly shown by our title papers, and what is alleged therein must be taken as true. (See authorities hereafter.)

Heath's petition shows that on December 28th, 1822, he had applied for a grant of the same land, which application was sent December 27th, 1822, to His Imperial Majesty by the previous ayuntamiento, and that as the same had not been returned he would apply *de novo* direct to the ayuntamiento under the law of January 4th, 1823, repeating his former petition. And it further shows that when he subsequently inquired of the ayuntamiento what had become of the former proceedings (see record of April 3d, 1823, page 12), it was answered to him that there had been received no direct reply. But that the government of the province, through Captain Jose Antonio Viscara, civil and military chief, in his official communication of the 2d of March, transmitted and commanded to be published the decree of the 4th of January, of the present year, evolving from the organized national junto, and sanctioned by His Imperial Majesty. He was directed to apply again for the land he wanted to possess. This was done, followed by the grant we present. Here, then, we have the fact that Heath applied first for the land in December, 1822, to the chief executive, that his application being sanctioned in all its parts by the ayuntamiento, was, as required by the laws as they existed, forwarded to the executive to make the grant, A new law on the subject of colonization being enacted soon after, Heath's petition was not acted upon, and the answer received by the ayuntamiento was to publish and carry out the law, or in other words: make the grant to Heath yourselves, under and by virtue of this decree, January 4th, 1823.

Again this law itself shows that the executive ordered "all tribunals, judges, chiefs, governors and all other authorities to

comply with this decree, and cause it to be complied with in all its parts."

Rockwell's Spanish and Mexican Laws, 620.

Here, then, we have an application by Heath to the executive for this land, made in 1822, under the law as then existing, before definite and complete action could be had thereon a change in the law occurred, followed with correspondence on the subject. This gave the executive knowledge of his application, and what occurred afterwards must be considered in that view. Both the Executive and the Provincial Governor had notice of Heath's application for this land for three or four months, a new law being enacted in the meantime they sent it to the council of El Paso with instructions to act in the premises. We submit that the fact of Heath's first application not being rejected, nor acted upon before passage of the law of 1823, when followed with the general order of the executive to councils and other authorities "to comply with this decree and cause it to be complied with," and with the letter of Captain General Jose Antonio Viscara, civil and military chief, under the instructions of his Imperial Majesty, directing the council to publish and carry out the decree of January 4th, 1823, by making the grant to Heath itself was virtually, if not an unconditional approval of his petition. It is not necessary for us to show a higher or better authority than this. The Ayuntamiento having acted, neither the Mexican nation nor its successor, the United States, can now say the grant is void, unless the grantee shows that it had definite and particular instructions from the the executive to act.

That the grant was made with the necessary instructions is sustained by many decisions, for the reason that the acts of officers purporting to be exercised in an official capacity, are not to be presumed to be usurped, but a legitimate authority previously given or subsequently ratified. Grants when made are supported with presumptions; the first, that instructions were given, and second, that subsequent approval followed.

U. S. v. *Arredondo*, 6 Peters, 691–727.
Delassus v. *U. S.*, 9 Pet., 117.

" No principle can be better established by authority of this Court than that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power. The principle on which it rests is believed to be too deeply founded in law and reason ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by law takes on himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud. *8 Pet., 452-5, 464; 9 Peters, 134, 734-5; 6 Peters, 727, and cases cited; 10 Peters, 331.* The same rule applies to the judicial proceedings of local officers, to pass the title of land according to the course and practice of the Spanish law in that province. *8 Peters, 310. When the act done is contrary to the*

written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motive set out therein, and according to some orders known to the king and his officers, though not to his subjects. 7 Peters, 96; 8 Peters, 447, 551-6. And courts ought to require very full pooof that he had transcended his powers before they so determine it. 8 Peters, 464; 9 Peters, 734."

Strothers v. *Lucas*, 12 Peters, 410–438.

If an act to be done by an officer whose duty it is to judge of the performance and rectitude of the steps which are to precede it, the doing of the act is a determination and judgment that the precedent steps have been performed, and were performed in good faith. The act is *res adjudicata* of the preliminary and precedent steps.

2 U. S. Cond. R., 291.
Horton v. *Brown*, 2 Tex., 91.

"The grant is evidence of the construction by the executives who made the grant, and it is well established that the construction of their powers and the laws which conferred them, adopted and acted upon by the former authorities of the country, must be respected, unless it is clearly shown that they have exceeded their powers or have acted in manifest contravention of the law. (*Jenkins* v. *Chambers*, 9 Tex., 167.) *The law was susceptible of two constructions, and the officer whose function it was to act under the law having decided, his decision could not now be disregarded, without establishing a principle which might strike deeply at the validity and security of the land titles of the country.*"

Ruis v. *Chambers*, 15 Tex., 586-590.
State v. *Gray*, 10 T., 503.
Hardman v. *Herbert*, 11 T., 656.
Hatch v. *Dunn*, 11 T., 708.
Johnson v. *Smith*, 21 T., 722.
Burns v. *Hicks*, 22 T., 155.
Howard v. *Colquhon*, 28 Tex., 134.

"Papers translated from a foreign language respecting the transactions of foreign officers, with whose powers and authorities the court was not well acquainted, should be carefully examined before the court pronounces that an officer holding a high place of trust and confidence has exceeded his authority."

U. S. v. *Percheman*, 7 Peters, 52-94.

"A grant or concession made by that officer who is authorized to make it carries with it *prima facie* evidence that it is within his powers; no excess of these or departure from them is to be presumed; he violates his duty by such excess, and is responsible for it. He who alleges that an officer entrusted with an important duty has violated his instructions must show it."

"If it was not a legal presumption that public and responsible officers claiming and exercising the rights of disposing of the public domain did it by the order and the consent of the government in whose name the acts were done, the confusion and uncertainty of acts and possessions would be infinite."

The principal of law has been applied to many colonization grants made under the laws of 1824, which provided that certain grants were not valid "without the PREVIOUS approval of the supreme general executive power."

In many cases, although no such previous or subsequent approval was shown, the courts of California and the United States have always sustained the same, frequently holding that the presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it. Under the Mexican law no method of expressing the executive will was provided; it was in different ways—circulars not published, private communications, personal instructions to the officers themselves. This being true it would be impossible, tedious and unprofitable to attempt to trace the obscure history of the various decrees, orders and regulations of the Spanish and Mexican governments on the subject.

It is sufficient for such cases that the archives of the Spanish and Mexican governments show that such power has been exercised by the governors, town councils, etc., and that such grants have been confirmed and held valid by the Mexican authorities.

Public acts of public officers properly to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.

U. S. v. *Peralta*, 19 How., 343.

The court said in case of *U. S.* v. *Clarke*, 8 Peters, 451:

"A grant made by a governor, if authorized to grant land in his province, is *prima facie* evidence that his power is not exceeded. The connection between the crown and the government justifies the presumption that he acts as according to his orders. Should he disobey them, his hopes are blasted as he exposes himself to punishment. His orders are known to himself and to those from whom they proceed, but may not be known to the world. Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal a grant having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title."

"*Prima facie* the governor of California under the Mexican dominions had the power to make the lease or grant set out in the bill under the general doctrine that an officer will not be presumed to have exceeded his authority, especially the officers of a foreign government. If there are any facts or reasons to overcome this presumption they should be shown."

Den v. *Den*, 6 Cal., 81.
Vanderslice v. *Hanks*, 3 Cal., 28.
Hart v. *Burnett*, 15 Cal., 530.
Payne v. *Treadwell*, 16 Cal., 221–6.
White v. *Moses*, 21 Cal., 34–40, 41.

But the defendants claim that these authorities are not applicable to our case, that they have been overruled and a new doctrine announced holding that no presumption arises from the issuing of a grant that the officer issuing the same had authority to act, relying upon the cases of *U. S.* v. *Cambuston*, 20 How., 59; *Fuentes* v. *U. S.*, 22 How., 460.

True in U. S. *vs.* Cambuston, presumptions of the existence of power, etc., in respect to Mexican titles since the act of August 18, 1824, are said not to be necessary or admissible. That the authority to make the grant must be gathered from the law itself and is not to be presumed. In these cases there were no Spanish records of the grant sought to be confirmed. The court held that under the law of 1824, grants were to be made in a certain mode and manner, and according to certain prerequisites. That the grant itself must state that it was made in exact conformity with the provisions of the law, and that there must be a record of the whole proceeding. The court further said, as there was no evidence of the observance of any of the preliminary steps made requisite by the act of 1824 to guard against improvided grants, and as they were required to be made an essential part of the record of title, there being no evidence of such record, the grant should not be confirmed.

U. S. v. *Cambuston*, 20 How., 63.

These authorities do not militate against the propositions we argue, nor reverse the decisions we rely upon. We admit that if an officer had no authority to issue a patent or grant this may be shown in law or equity. The grant is only *prima facie* evidence of the power exercised. We further admit, that when there is no record showing a compliance with any of the preliminary steps made requisite by the act of the Mexican congress of 1824 to a grant of the public domain that there may not be a presumption that these preliminary proceedings were complied with for the reason they are and must be under the act, part of the record. This is all the cases relied upon by defendants hold. They are rendered under the law of 1824, and applicable to its construction and particular provisions and have no application to the particular point in our case. Here it is provided by the law of 1823 that the ayuntamientos, *in conformity with the instructions of the executive* may make certain grants we contend that a grant issued under this law is conclusive evidence that the authority issuing the same had the necessary executive instructions.

That every prerequisite had been performed is an inference properly deducible from the existence of the grant itself. If an order or any instructions whatever from a higher officer to the authority making a grant is necessary, the courts are bound to presume that such order or instructions were given.

Minter v. *Crommelin*, 18 How., 87–8–9.
Bagnell v. *Broderick*, 13 Peters, 450. Affd. in
Redfield v. *Parks*, 132 U. S., 245.

U. S. v. *Arredondo*, 6 Pet., 730–1.
Polk v. *Wendell*, 9 Cranch, 98–9.
Polk v. *Wendell*, 5 Wheat., 304.
Smelting Co. v. *Kemp*, 104 U. S., 636, 646.
Hoofnagle v. *Anderson*, 7 Wheaton, 212.
Edwards v. *Rolley*, 31 Pacf., 367.
Easton v. *O'Reily*, 63 Cal., 309.
French v. *Fyan*, 93 U. S., 169.
Jim Silver Co. v. *Campbell*, 135 U. S., 296.
Quinn v. *Chapman*, 111 U. S., 445.

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Section 4 is not an inhibition against the ayuntamiento granting lands without executive instructions. It does not say whether they shall be in writing or oral or that there should be further instructions than what are given in the law itself. The words are "*in conformity with the instructions of the executive.*" We therefore say *that the* issuance of our grant is conclusive. Instructions of emporer were often known only to himself and those to whom given and hence not subject to proof, but the well established rule in judicial proceeding of local officers to pass title to land in Spain and Mexico is to hold that all acts done by such officers even though contrare to the written orders of the king were done on the motives set out therein, and according to some orders known to the king and his officers, though not to his subjects.

Strothers v. *Lucas*, 12 Peters, 410–438.
U. S. v. *Clarke*, 8 Peters, 451; 7 Peters, 96; 9 Peters, 734.

We submit there are no cases that deny the proposition that there is a distinction between the want of power to make a grant and the proper exercise of all the incipient steps in perfecting the same. The issuance of a grant is evidence of both *prima facie* of the authority of the officer to make the grant and *conclusive evidence* that all previous steps were regularly taken to justify the making of the grant. (See authorities above.)

The point we agree has been sustained by high authority and reaffirmed in well considered cases.

"A patent is the completion of title, *and establishes the performance of every prerequisite. No inquiry into the regularity of these preliminary measures which ought to proceed it is made in a trial at law!*"

No case is shown that it may be impeached at law for fraud, not legal and technical, but actual and positive fraud in fact committed by the person who obtained it, and even this is questioned.

Stinger v. *Young*, 3 Peters, 340.

"It is not doubted that a patent appropriates the land. *Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date and has always been held conclusive against all whose rights did not commence previous to its emanation.*"

Hoofnagle v. *Anderson*, 7 Wheaton, 212.

"The testimonio is the final title, and all inquiry as to the proceeding of the officers anterior to the issuance of the grant is precluded where it appears, as in this case, the officer had authority to make the grant and no fraud is charged on the part of the grantee. All the proceedings necessary to the grant are conclusive, *Stinger* v. *Lessee of Young*, 3 Pet., 32; *U. S.* v. *Arredondo* 6 Pet., 729; *Brown* v. *Jackson*, 7 Wheat., 218; *Ward* v. *McKinney*, 25 Tex., 258-266."

"A legal presumption arises in the issuance of any public grant that all preceding acts necessary to give it legal validity have been done before it is issued *and that if there have been any irregularities committed by the officers of the government prior to the grant, the government and not the individual must bear the consequences resulting from them.*

U. S. v. *Arredondo*, 6 Pet., 730–1; 5 Wheat., 304.
U. S. v. *Clarke*, 8 Pet., 436.
Delassus v. *U. S.*, 8 Pet., 134.
Vorhees v. *U. S. Bank*, 10 Pet., 478.

The only point ruled in the case of *Minter* v. *Crommelin*, 18 How., 89, was that a patent is conclusive that an order of the secretary, which was a necessary previous step, had been given. The state court pronounced the patent to be void for want of authority in the officer of the United States to issue it because the record did not show that the order from the secretary to the register had been given. The Supreme Court, by an unanimous opinion, reversed the judgment. Holding:

"*The rule being that patent is evidence that all previous steps had been regularly taken to justify making of the patent, and one of the necessary previous steps here being an order from the secretary to the register to offer the land for sale because the warrior had abandoned it. We are bound to presume that the order was given.* That such is the effect, as evidence, was adjudged in the case of *Bagnell* v. *Broderick*, 13 Peters, 450, and is not open to controversy anywhere, and the state court was mistaken in holding otherwise."

Affirmed in *Randolph* v. *Parks*, 132 U. S., 245.

Smelting Co. v. *Kemp*, 104 U. S., 636, affirms this point, using the same language.

The court on pages 645-6 further said:

"If the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualifications that when the authority depends upon the existence of particular facts, *or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decisions.* The general doctrine declared may be stated in a different form, thus: A patent in a court of law is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land in that court the

patent is unassailable former errors of judgment. Indeed the doctrine is as to the regularity and validity of its acts. when it has jurisdiction goes so far that if in any circumstances under existing law a patent would be held valid it will be presumed that such circumstances existed," affirmed in *Steele* v. *St. Louis Smelting Co.*, 106 U. S., 454; *Oliver* v. *Pullman*, 24 Fed., 127–8.

It is clear the cases of Cambuston and Fuentes do not overrule *Minter* v. *Crommelin* and kindred cases. Minter is affirmed and reaffirmed, while Cambuston is limited, explained and modified. When applied to the act of 1824, and its particular provisions and to grants, the genuineness of which is denied, and no copies of said grants are to be found on the record, it may be good law.

"The several cases cited by counsel, where the omission of proceedings usually taken in obtaining concessions of land, are noticed and made grounds of objections to a confirmation, have no application. They are cases where the grants produced were *unaccompanied by any archive evidence*, and the attempt was made to uphold them by evidence of the recollection of witnesses. *Thus, in the Cambuston case, 20 How., 59, the alleged grant produced was unknown to any person besides the grantee and an interested party until July, 1850, although bearing date in May, 1846, and no trace of its existence was found iu the archives of the country.*"

Hornsby v. *U. S.*, 10 Wall., 225-241.

"In this and Cambuston case, the want of genuineness of the concession was proved, but in all cases where it was not attacked, the presumption that all necessary previous orders were given, was conclusive."

We have no controversy with the law as stated in *Fuentes* v. *United States*, 22 How., 443–459. It affirms the cases of Peralta, 19 How., 343; Delassus, 9 Peters, 117–133; Arredondo, 9 Peters; Bagnel, 13 Peters, 437, and *Minter* v. *Crommelin*, 18 How., 88, where it was held that a concession or deed being regular in form, carried *prima facie* evidence that it was within the power of the officer to make it, and *that no excess or departure from instructions should be presumed*, and that he who alleges that an officer intrusted with an important duty has violated it must show it, *and that the courts were bound to hold that all orders or instructions, if any, necessarily coming from higher authority, had been given prior to the grant.* As said by Chief Justice Marshall:

"These principles are too deeply founded in reason and law ever to be successfully assailed."

U. S. v. *Clarke*, 8 Pet., 453.

The court, on page 460, 22 How., said:

"It is not, however, to be supposed that no title in California can be valid, which has not all the preliminary requirements of the act of the Mexican Congress of 1824, and of the regulations of 1828. But, if none of them are to be found in the archives, and it can not be established by proof that they are registered there, this court will not presume that they were preliminary to a grant."

Again, on page 459, affirming Peralto, 19 Howard, 343, and like cases, said:

"The decision there is that when a claimant of land in California produced documentary evidence in his favor, *copies from the archives in the office of the surveyor general*, and other original grants by Spanish officers, the presumption is in favor of the power of those officers to make the grants. There the authenticity of the documents was admitted, and the validity of the petitioner's title was not denied on the ground of any want of authority of the officers who made the grant. This court then said, that the public acts of public officers imputing to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified."

We beg the court to notice the accidental misstatement of Judge Wayne in the case of *Fuentes* v. *U. S.*, 22 How., 451, where he says that

"The authority of the officer who made the grant in Peraltes case was

In some recent opinions, the cases of Polk's lessee vs Wendall 5, Wh. 304, Smelting Company vs Kemp 104 U. S. 636 and Minter vs Crommelin 18, Howard 9, have been exhaustively reviewed and strongly affirmed, holding that the execution of a deed is a final act and when done by an agent of the government, and is duly signed, sealed and delivered, not only operates to pass the title, but is in the nature of an official declaration of the government that all the requirements preliminary to its issue have been complied with; that this presumption is conclusive and can not be inquired into except for fraud. That no one who is a stranger to the title or does not claim under the same deed can call in question the validity or regularity of such conveyance, or by subsequent intrusion upon the possession acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. That if the authority of the Ayuntamiento depended upon the existence of certain facts it was its duty to ascertain whether these facts existed; that its determination is evidenced by its deeds and possession given, and the same is conclusive against any attack at this day.

Ming vs Foote, 23 Pacif. 515.
Green vs Baker, 47 Nebr. 934. 66, N. W. 1032.
Taylor vs Winona etc. Railroad Co. 47, N W 553-4.
Chever vs Horner, 11 Colo. 72, 17 Pacif. 495.
Anderson vs Bartels, Colo. 256, 3 Pac. 235-9.

language of the law of 1823, and grants made under that law have always been sustained by Mexico and the United States.

FOURTH. *Ponce de Leon, a high Mexican official, commissioner and political chief of the Borbos District, in proceedings to perfect the title of Juan Antonia Garcia in 1849, referring to this grant, certified that Juan Gid asked for and received a grant of land from the Mexican authorities.*

FIFTH. *The departmental assembly by its action of June 17, 1823, directing the Ayuntamiento of El Paso to notify Heath not to bring his families to Mexico in order to avoid damages Heath could recover if the families should come and settle, admitted the authority of the said Ayuntamiento under the law of 1823, to make the grant it did.*

It may be that when want of authority to make a deed does clearly appear in the record, that this authority cannot be supplied by the presumption of its validity which arises from the issuance of the deed itself, but we do assert that when there is a doubt as to the meaning or interpretation of a Spanish law, the first duty of the court was to ascertain what was the views and ideas of the Mexican people at the time concerning the law. Did they believe that the words of this act gave the power to make the grant, then that power should not now be denied by the courts of America. If, as the record shows, a similar grant was made by the town council to Jesse Lerma, a colonist, for 400,000 acres of land, and this grant was afterwards sustained by the Congress of Chihuahua as a valid legal title, then our grant should likewise be sustained by our courts. Add to this the facts that the power to make grants under the law of 1813 was similar to that of our act, and that Ponce de Leon, in 1849, swore that Heath had received a grant from the Mexican authorities, that the Departmental Assembly admitted this authority, but criticised its advisability, we have full, complete and ample Mexican authority to support this grant. The court did not attribute to these facts the important consideration they should have received, and wrongfully gave to the Mexican laws a more strict construction than they received from the Mexican authorities who were intrusted with their execution and enforcement. This is not the construction that has been applied to such laws by this honorable court where microscopic objections are not urged, but a liberal interpretation given.

Honsby v. *U. S.*, 10 Wall., 237.
U. S. v. *Moreno*, 1st Wall., 404.
U. S. v. *Auguesola*, 1st Wall., 352–358.
City of Brownville v. *Basse*, 36 Tex., 461–502.

The first proposition stated above is argued on page .

Second Proposition. The law of January 4, 1823, being repealed soon after, and never having been published and promulgated anywhere except at El Paso Del Norte, was therefore never in force in any other part of the Republic of Mexico. For this reason it is impossible to find any other grants made under the law except the one to Jesse Lerma, August 15, 1823. On this day Jesse Lerma, a colonist, petitioned the Ayuntamiento of El Paso Del Norte to grant him 400,000 acres of land promising "to colonize it with the families which desire to accompany him thereto." This petition was allowed, a commission appointed, and Lerma put into possession of the land by the town council of El Paso. In 1828 certain parties denounced Lerma's land for want of cultivation and settlement, and on May 12th of that year he appealed to the Government of Chihuahua for the protection of his vested rights. The matter was laid before the Congress of that state and his title was sustained and confirmed—the states having jurisdiction of the public lands at that time under the law of 1824. This confirmation of the Congress of Chihuahua in 1828 of Lerma's grant made for a larger tract of land than ours, four months afterwards, and by the same authority which gave us our title, is persuasive, if not conclusive evidence of the right and power of the Ayuntamiento of El Paso to make grants under the law of 1823.

Brownville v. *Cavayos*, 100 U. S., 138-142.
Hardiman v. *Herbert*, 11 Tex., 655-660.

Recently a controversy over 160 acres of this land arose in the District Court of the United States, and the Lerma title was sustained. Judge MAXEY said: "The grant being valid is within the protection of the treaty of Goudalupe Hidalgo and the Constitution of the United States, and it is not competent for the state to nullify it as a state claim without judicial inquiry or to prohibit its use as evidence."

Lerma v. *Stevenson*, 40 Fed., 356-9.

In the case of the *United States* v. *Paralto*, 19 How., 347, the court holding that:

"The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officers making it, and throws the burden of proof on the party denying it." Says,

"It is sufficient that the Archives of the Mexican government show that said power has been exercised by the government under Spain and continued to be exercised under Mexico, *and that such grants made by the Spanish officers have been confirmed and held valid by the Mexican authorities.* The plaintiff in error has not been able to produce anything from historical document or the Archives of California tending to show a want of power in the respective officers in this case. On the contrary, the presumption of law is confirmed by both."

The confirmation of Lerma's title is of all importance to us. On account of the short life of the act of 1823, these two titles were the only ones ever made in all the Republic of Mexico. The reason there were not more has been fully explained, and was not on account of the doubt of the Ayuntamiento to act in the premises. These grants were identical in form, object and spirit, and made by the same authority. The grant to Lerma was more than twice the amount of land given to Heath. The only distinction of the two grants were:

1st. Lerma was a native born Mexican; Heath was not.

2d. Lerma's grant was ordered by the departmental assembly, Heath's was not.

That Heath was, or had been prior to his application, an American citizen, was not material under the law. A foreigner was entitled to the granted bou.. y just the same as a Mexican citizen.

That the departmental assembly at that time did not have the right to grant, approve or reject titles will be clearly shown hereafter.

That if the town council had authority to grant to Lerma lands with approval of the Departmently Assembly, under the act of 1823, they had a right to make a grant to Heath without approval, therefore, if the grant to Lerma was legal and valid, so, too, was the one made to Heath. If the Ayuntamiento of El Paso in August, 1823, had the authority to grant as it did to Jesse Lerma a tract of land of 400,000 acres outside of the four leagues of El Paso "*to colonize it with families which desired to accompany him thereto,*" *then it also had authority to grant to Heath 130,000 acres to be settled with people he proposed to take with him.*

That the grant to Lerma has been determined by Mexican authorities to have been legally made is clearly proved by this record. (See pp. 249–256.)

Just as in our case the town council of El Paso, which succeeded the one in authority in 1823, tried to declare Lerma's grant invalid. In 1827, Lerma's grant was denounced by others who wanted to settle upon it. The town council then in authority decided against his title, Lerma being then in the country appealed to the governor of Chihuahua, while Heath having been driven out of Mexico by revolutionary authorities under the penalty of imprisonment and death, could not return. Lerma's case was taken to congress where it was held "wherefore this government considers that the land transferred by the granted bounty as the exclusive property of said Lerma." It cannot be said that this is only a ratification of an imperfect title by reason of Lerma being a Mexican citizen and a distinguished officer of the army, but it was a judgment of the constitutional authorities of Mexico that the town council of ElPaso had authority to make a grant identicial with that of ours. Lerma's land being denounced, the town counsel of El Paso refused to acknowledge his title, granted part of his land

to three other persons, he asked the government "*to recognize and protect his ownership of the lands, confirming him in his property which was granted him in order that a settlement be formed on said lands, and that the council of the town of El Paso be notified accordingly.*

This petition was sustained, the congress saying, "we consider *that the land transferred by the granted bounty as the exclusive property of said Lerma,*" in other words that the Ayuntamiento, under the law of 1823, had authority to make grants to colonists for the purpose of settlement. Nothing could be stronger in the right of confirmation of our title. It is not the confirmation of an imperfect or doubtful title on account of the favored circumstances of the applicant, but it is an adjudication of Mexican authority of the right of the Ayuntamiento to make a grant, not that the property might become his, but that is was already his by a valid grant, the "*land transferred by the bounty as* the exclusi roperty of said Lerma" is the language of the Mexican congress.

Our grant being similar to that of Lerma's, and having been made by the same Ayuntamiento, it is conclusive of the authority of that body to make it. Upon this point, the authorities are complete.

In the case of the *City of Brownville* v. *Basse*, 36 Tex., p.

As is said in Owen vs Presido Mining Company 61, Page 13, "Ratification eliminates from the case all question as to the Alcade power" (here town council) "to make and execute such a grant."

The confirmation of similar grants made by acts of congress or by boards of commissioners acting under their authority are also powerful evidence of the lawful exercise of the authority of these officers and being proceedings under the treaty and law, they are made a rule by which among others we may adjudicate on the claims of the present parties; in doing which we can not sustain this objection without overlooking such a concurrence of evidence of various description as leaves no reasonable cause of a doubt of the authority of Governor Folch."

Mitchell vs The United States, 9 Peteres 740

in making the ex-appropriation of the lands in controversy, for public use in 1826, were not in all respects regular and valid."

Our courts have always deferred to the political and judicial authorities of other governments in the administration and interpretation of their own laws.

Cavayos v. *Treviño*, 35 Tex., 165.

Third Propositian. Pueblo grant, or grants made by Town Council under other laws.

We submit that as the authority to Town Councils to make grants, in the law of January 4, 1813, and other laws of Mexico, was conveyed by similar if not identical language with that found in act of 1823, and the fact that such grants have always been sustained by both Mexico and the United States, is another conclusive reason for holding that our grant was made by legal authority.

The power given under this law to the Ayuntamiento to make this grant must be determined upon a proper construction of this act of January 4, 1823. The court must look to this law both for the power to make the grant and for the mode and manner of its exercise. Certain conditions and restrictions in the former laws and imposed upon the subsequent act of 1824 may serve to explain and make certain the authority of the Town Council to make this grant, but cannot enlarge or take away any right given in the law. If by any law prior to 1823 the Town Council had no power to make grants, and by this act of January 4, 1823, that power was given them, then the former law to that extent was repealed.

The history of Mexico does show that Ayuntamientos had a right under the laws to make grants of lands, which was exercised for many years, especially from 1823 to 1824. Some of these grants have been confirmed, and others are before the courts. We might cite many of these grants made during all these years from 1813 to 1824, but will content ourselves by referring to three claims. The town of Casa, Colorado, Donacious Vigil and Alexander Valle. These grants were made under the law of 1813. Many features of this law are similar to the act of January 4, 1823, passed just ten years later. In both laws the power to make the grants is given to the Ayuntamientos by the same word "designate" or "assign," but in the first law it is expressly required that the grant made must be approved by the Departmental Assembly and in the second there is no such provision. These cases are not only important to us on this proposition but they very pointedly and forcibly affirm many of the points we argued before we found them.

Decree of January 4, 1813, on reducing vacant lands to private dominion. Sureties ceded to the defenders of the country and to citizens, not proprietors.

Hall's Mexican Laws, Sec. 88, p. 45.

The first part of the law relates to lands given to soldiers. Sec. 99, Designation of Sureties, 11. The designation of these sureties shall be made by the Constitutional Ayuntamientos of the pueblos to which the lands belong as soon as the interested party shall present their documents. Next, the Expedente shall be remitted to the Provincial Deputation in order that the latter may approve it and rectify any error.

Sec. 30. Lands to be Assigned. 15, provides for giving of vacant lands to every resident who has no other lands of his own.

Sec. 105. Concessions without costs, 17. The provisions for these concessions shall be made also without costs by the Ayuntamientos, and the Provincial Deputations shall approve them.

In this act how similar is the designated power to make grants to that power in the law under which our grant was made. The fact that in our case no subsequent approval is required, does not vitiate the law or destroy the grant. The nation had a right to appoint its agent with or without subsequent approval and we must take the law just as we find it. Notwithstanding this positive law, which no one has ever questioned, and the fact that dozens of grants were being made under it at the very date of our grant, the learned council argue and seek to persuade this court that this grant was void, because the Ayuntamientos could not make grants of town lands. In both instances the lands were public lands and within the jurisdiction of the nearest organized town council to them. If the gentleman's argument is correct, then all grants made under the law of 1813 would be void.

The grant to Casa, Colorado, was made by the most illustrious corporation of Tome, July 12, 1823, for 31,779.87 acres under the law of 1813, reported No. 5 of New Mexican Land Grants, filed April 14, 1856, approved by the surveyor general, December 24, 1856, confirmed by congress October 22, 1858, Sec. 35; 35th Congress, 2d Session Report, 457, p. 18-161.

The proceedings in this grant confirm the argument we have made. The grant being intended for many and not for one alone all the grantees were named in the margin of the petition. It was subsequently approved by the Provincial Deputation because the law so required, otherwise the proceedings were similar to those in our case.

The case of *Donacious Vigil et al.* v. *Rafael Gonzales et al.*, is of such importance, we will refer to it at length. See claim No. 8, Report 457, on Claims in the Territory of New Mexico made by Mr. Sandridge May 29, 1858, page 105-154, 228-277. Recommended by Surveyor General Sept. 28, 1857, for confirmation and confirmed by the act of Congress June 20, 1860.

Land Laws of the United States, 1882, page 944.

This case affirms the following points in our case:

First. That Ayuntamientos could and did make grants in Mexico under a power similar, if not identical, with the words of the act under which we claim.

Second. Any restriction, reservation or condition not authorized by law added by a Governor to a grant made by a Town Council, is void.

Third. That the Ayuntamiento of El Paso having authority to make grants to colonists could not delegate authority to the

Governor or Assembly to approve or reject such grant, having acted by making the grant, could not delegate any authority to another to undo what it had done.

On May 26, 1814, Francisco Frujillo for himself and others named petitioned the Governor, Jose Manrique, for a grant of land for the purpose of pasturing their animals on, the same day the Governor referred the petition to the Town Council of Santa Fe directing attention to the law of 1813; also stating, as in our case, that a petition had been made by the same parties the year previous, and which had been transmitted to the chief military officer of the district, from whom no answer had been received.

July 30, 1814, the corporation of Santa Fe granted to the petitioners the vacant lands asked for. On the 22d day of June, 1815, a decree was written on the reverse of the document containing the grant made by the corporation by Alberto Maynez, Governor of the department, attempting to limit this grant that had been made in fee by the council to a right only to pasture their stock in common with others who thought proper to go there, informing them that a royal grant was only intended to cover said lands as they might plant, cultivate and fence in. December 5, 1815, the petitioners were by the Town Council put into official possession of the lands granted to them the year previous. Among the objections made by the corporation were the following: First, That the grant was made by the Town Council and was never referred to or approved by the Provincial Deputation as required by law. Second, That the grant was only to such portions of land as should be enclosed, built upon and cultivated, with right to pasture upon other portions of land within the prescribed limits. Wm. Perham, Surveyor General, quoting Article 15-17, of the law of 1813, as above, said: "The grant under consideration was made according to the provisions of law as far as the Town Council was concerned, the approval of the Provincial Deputation was a condition subsequent. The law required the Corporation or Town Council to transmit their communications to the Provincial Deputation, through the Governor, a political chief, and it has been decided by the Supreme Court of the U. S., in the case of Fremont vs. The U. S., that the omision or inability of public authorities to perform their duty cannot, upon any principal of law or equity, forfeit the property of the individual to the state. 17 Howard, p. 563. Then quoting articles 2 and 18 of the law of 1813, the General said:

"The law vested in the Town Council full authority to make these grants, and imposed no further conditions than the disposal of them after four years, and the prohibition of entail and the conveying by title of mort main. The grant made by the Town Council in this case is an absolute one, and the provisions of the law require it to go into effect immediately, so it was in our case, as the date of concession constituted legal ownership. The second article of the law required the limits of the respective tracts to be specified in order that their owners may enclose or fence them in.

This is a matter left to the option of the owner, and not a consideration imposed upon him by law. Therefore the interpretation of the law made by a subsequent governor after the grant had been made according to law by the Town Council was not binding on the parties, and was, therefore, null and void, as the law vested in him no authority to impose conditions; and any part taken by him in the premises, with the exception of being the medium between the Town Council and the grantees, was an assumption of power on his part for which he had no authority of law. The treaty of Guadalupe Hidalgo of Feb. 2nd, 1848, and the decision of the Supreme Court of the U. S., in cases occurring in Florida, Louisiana and California of a similar nature, give, in the opinion of this office, a full and perfect title to the land contained within the boundaries of the grant made by the Ayuntamiento of Santa Fe."

In the case of the claim of Alexander Valle, same report, p. 293, the Surveyor General said:

"The law of 1813, under which it is presumed the grant was made, attached no couditions thereto; and it is not shown in evidence that the Governor had any authority to attach contitions to a grant made by virtue of said law or any other in force at the time, the grant is to be considered an absolute one, and as such is confirmed."

The confirmation of these claims by Congress establishes the law of the United States upon points involved in our case, and upon which its favorable decision rests. If a grant is good as here held, without approval by the Departmental Assembly, under a law providing for such approval, our grant must be valid without approval made under a law which does not require confirmation, and that therefore any attempted submission of our grant to the Departmental Assembly was utterly void.

We cannot understand how the question argued by the gentlemen in court below have anything to do with our case as to whether the abolishment of the Chamber of the Indies by the decree of the extraordinary Cortes repealed the regulations of 1754 and the laws of the Indies respecting the public domain. We have the decision of the U. S. Land in the Hayes case that the ordinance of 1754 was repealed by the resolution ofthe Council of the Indies of December 22, 1818. Why worry over this when, as we have shown, the resolution referred only to municipal dominion, property within five leagues that belonged to towns for public use, and, again, how could it effect a right given to the councils by a subsequent law? Repealed or not repealed, did not the Imperial Mexican Congress after the independence of the nations have the right to pass a law of January 4, 1823, giving power to the Town Council to make grants of the public lands, no matter what were the regulations of 1754 or the law of the Indies? They have no more to do with the determination of this intermediate question than have the laws of the Medes and Persians.

Again, on page 19 of their argument, the learned counsel assert that the decree of the extraordinary Cortes of January

4, 1813, which we are arguing, "was annulled by the royal decree of September 5, 1814, *and did not confer by its provisions the power to grant the public domain.*" It makes no difference in our case whether the decree of January 4, 1813, was annulled or not; it could not have been or else it was restored, or the many grants under it between 1814 and 1824 would not have been made and confirmed, as is shown by the history of Spanish and Mexican grants, and the decisions of the authorities of the United States. But it is important, in ascertaining the law and facts of our case, to know that the Town Councils of Mexico did have a right to make grants under the law of 1813, and that this right was given by words similar to the language found in our law of January 4, 1823. For this reason we refer to this law and the grants made under it. If the Spanish Government gave the power to make grants to ayuntamientos, subject to the approval of Departmental Assemblies, it is not strange or impossible for the Mexican Government to give her Town Councils the same right without the requisite of subsequent approval. When the gentleman argues that the law of January 4, 1813, "did not confer the power to grant the public domain," we beg to say they differ from Mexican authority on this subject. Sec. 126, under the law of 1813. The law of the Cortes of January 4, 1813, granting to soldiers the right to claim suertes of lands in Pueblos, vested the power in the council to designate the lands to be given to them; and also to execute all the proceedings relative thereto; that is, to make the titles for said lands.

Hall's Mexican Laws, p. 54.

We can not better illustrate the truth and absolute conclusiveness of our whole argument upon the right of the ayuntamiento of El Paso del Norte to have made our grant than by inviting special attention and comparison of the law of January 4, 1823, with the law of January 4, 1813. There can be no doubt of the right of the ayuntamiento to make grants under the latter law. This conceded, as it must be, it must follow that it had the same rights under the law of 1823. The words giving this right under the law of 1823, are the same or similar to those in the law of 1813; if anything are stronger, plainer and more certain.

In article 11, of the law of 1813, we have "the designation of the suertes shall be made by the constitutional ayuntamientos." Art. 15, lands assigned to those who have no other lands, and by Art. 17, "the concessions to be made by the ayuntamientos without costs, and the provincial deputation shall affirm them," while in the law of 1823, Sec. 4, we have the words, "the ayuntamientos may designate the lands corresponding to them."

Sec. 8, of the law of 1823, speaks of the lands to be GIVEN to the colonists; in Art. 2, of the law of 1813, it is provided that "lands distributed shall be done as complete property," while in section 22, of our law, it is said, "the date of the concession of lands constitutes an inviolable law for the right of property and

legal ownership," and in section 23 it is provided "if, after two years from the date of concession, the colonist should not have cultivated his land, the ayuntamiento can grant it to another." Nowhere, in the law of 1813, is the word grant used. The power or right to grant is given by the word designate, assign or concede, or designation, assignment or concession. If the learned counsels had examined the laws of 1823 and 1813, and the decision under them, it seems to us they never would have come to the false conclusion they were driven to when they wrote, on pages 22, 23, "we cannot, by the most latitudinarian construction, hold that this section confers any authority upon the ayuntamiento to grant lands." Hence, 'colonist' must mean one of a family settled under an empresario contract, or one of a family settled upon lands designated to them by the ayuntamiento, and in neither case would the title emanate from that body. In the first place, the title would be issued by the Commissioner of the colony, with the consent of the empresario. In the last case the grant would be issued directly by the Government of the place to which the colonist had attached himself, having first admitted him and put him in possession of his lands. These two classes constituted colonists within the meaning of the law. No other colonist, if any there was, was within the contemplation of the law of 1823. The construction which we have given to this law is the same as the Supreme Court of Texas gives to the colonization law of 1825 of Coaliula and Texas, *which is similar in its provisions to the law under consideration.*" (The italics are ours.)

Harlin v. *Haynie*, 9 Tex., 459.

Here is the key to the whole of the gentleman's argument on their first point, they erroneously assume that the law of 1823 is similar to the law of Coaluila and Texas and they argue that because under this last law titles were issued by the Commissioner of the Colony or direct from the Government, and that therefore the Ayuntamiento had no authority to grant lands and "hence colonist must mean one of a family settled under an Empresario contract, or one of a family settled upon lands designated to them by the Ayuntamiento; and in neither case would the title eminate from that body." We submit that the law of Coaluila and Texas is unlike that of 1823, and say that the gentlemen cannot show a section, paragraph or line in the two laws which are alike in word or spirit. A contrast of the two laws will help to verify our argument as well as to show the false propositions of the defendants.

Extracts of the Colonization Law of the State of Coaluila and Texas, March 24, 1825.

Hall's Mexican Law, p. 131.

Sec. 413, Art. 3.—Foreigners to make a declaration of settlement and citizenship before the Ayuntamiento swearing to obey the Federal and State

constitutions and observe the prescribed religion. The learned gentlemen would hardly claim that this was "similar" to section 4 of our law of 1823.

Sec. 414, Art. 4.—May then select land which the respective political authority will grant to him *in the same manner as to a native in conformity with the existing laws of the Nation*, under the conditions that the proceedings shall be passed to the Government for its approval.

This is entirely different from anything in our law, the grant is to be made according to the provisions of another law, and then must be approved subsequently by the Government.

Sec. 428.—Immigrants to present themselves to the authorities.

Art. 15.—The families who immigrate in conformity with article 6 shall immediately present themselves to the political authority of the place which they may have chosen for their residence, who, finding in them the requisites prescribed by the laws for new settlers, shall admit them and put them in possession of the corresponding lands, and shall immediately give an account thereof to the Government *who themselves or by means of a person commissioned to that effect will issue them a title.*

Where is there any provision in our law like this? The fact that it is omitted is conclusive that our argument is correct. The Ayuntamiento having the right to designate the land to colonists, to assign and concede the same to him, it must be held, as it has been under the law of 1813, that that body had a right to execute all the proceedings relative to grants and make title of lands to colonists. And yet the learned counsel say that the provisions of these two laws are similar,

Fourth Proposition: Ponce de Leon, Secretary of the Town Council of El Paso, and Commissioner to deliver possession when our grant was made, and a witness in 1849 for Hugh Stevenson and Juan Antonia Garcia, certifies:

"that Don Juan N. Garcia, deceased, the father of the petitioner, asked for the possession of the land called El Bracito. That he also knew, not remembering the years, that an individual of the United States, named John Gill (the Spanish is Juan Gid) asked for and *received a grant* of land at the same place from the Mexican authorities, respecting those of Don Juan Garcia; this, he affirms having been one of the Commissioners in the measurement of the land asked for."

See Report 457, House of Representatives, May 29, 1858, pages 24–65–88, and page 265 of our record.

This evidence was given at request of D. Juan N. Garcia, in order that the supposed grant to Don Juan A. Garcia might be confirmed.

That William Pelham, surveyor-general, December 31, 1856, reported that the supposed grant to Garcia was lost or destroyed, and among the reasons given recommending Congress to confirm the same was the fact that the Mexican Government had made a

grant to Juan Gid "at the same place respecting those of Don Juan A. Garcia."

Here is the positive proof of the existence of our grant and, too, the evidence of its validity. True, it does not state our grant was a valid one, but if it had not been made with legal authority, it would have been no inducement for the confirmation of the Garcia grant. Having used the fact for this purpose, and the United States acting upon the same, must be held, at least, as a recognition of our rights, if not estoppel of both from now denying either the fact or validity of our grant.

They had no expediente or proof of same from the records in any of the Mexican archives. This fact was then important and necessary to secure the confirmation of their claim. If our grant was made designating the grant to Stevenson and Garcia, that was such a recognition of their grant by the Mexican government, as would authorize the American government to confirm their grant. We submit that a recognition of the Gid grant in the proceedings of confirmation of the Stevenson and Garcia claim has the same effect.

The United States after having confirmed the grant to Garcia and Stevenson because the Mexican Government had made a grant to Juan Gid, in conformity with it, cannot now say Juan Gid had no grant. The confirmation of this report is conclusive evidence that ours was a lawful, operative grant which the authorities of both nations recognized.

Clarke v. *Lockwood*, 21 Cal., 220-34.

Congress, acting in its sovereign capacity in dealing with the Mexican lands, having chosen to thus recognize the grant to Gid or Heath, it is not for the judicial department of our government to controvert what they have done.

Interstate Land Co. v. *Maxwell Land Co.*, 139 U. S., 569-579.

Tameling v. *U. S. Freehold Co.*, 93 U. S., 644.

No action of Congress relative to Mexican grants is subject to judicial review. If courts are thus bound by Congressional confirmation of a Mexican title, they are equally bound by Congress' recognition of such title. Congress acted upon the claim "as recommended for confirmation by the surveyor-general."

Tameling's case, 93 U. S., 644.

The Government, as well as individuals, is estopped by the admissions or recognitions of titles or boundaries of lands mentioned in any deed of conveyance to another from afterwards denying that such title existed.

Greenleaf on Evidence, Sec. 23.

20 Am. and Eng. Ency. L., p. 466 and note.

Grimes v. *U. S. Hoff*, R. 108-9.

2 Phillips on Evidence, 241.
Carver v. *Astor*, 4 Peters, 1–87.
Pencose v. *Griffith*, 4 Binn, 231.
1 Black, 204, 2 Black, 554.
Evans v. *The Board of Trustees*, 15 Ind., 319.
Denn v. *Colders*, 3 Johns Cas., 174.
State of Indiana v. *Milk*, 2 Biss, 197.

"In 1830, when the legislature authorized, and by its Treasurer made, to Elkins and his associates a grant of land to extend from the town of Lincoln on the west, to Hart's Location on the east, the exterior line extending along by the westerly boundary of said location, it is difficult to find any ground to imagine how, after that, the *state or any persons claiming under the state could with any show of reason, claim that there was no such thing in being as a Hart's Location.*"

Land Co. v. *Saunders*, 103 U. S., 321.

Recitals in a patent (and in our case there being no patent issued, the proceedings in Congress to obtain confirmation are the same) are always held more liberally to be evidence of what are recited, than are the recitals in an individual's deed for the reason that all lands are derived from the Commonwealth, and, therefore, the man in possession must hold from her. Thus holding he is subject to whatever recitals and admissions the state may have made before he commenced to hold. It is frequently held that a patent is not only the deed of the United States—it is evidence of the proceedings had, and is a solemn record of the government of its action and judgment with respect to the title. Both the officers of the government and the grantee, as well as those in privity with him, are bound by the recitals contained in the patent.

McGarrahan v. *New Idria M. Co.*, 49 Cal., 331.
Teschemacher v. *Thompson*, 18 Cal., 11.
Read v. *Thompson*, 5 Pa. St., 327.
Downing v. *Gallagher*, 2 S. & R., 455.
Comw. v. *Heirs of Andre*, 3 Pick., 224.

The claim that the Garcia tract was outside of our grant does not effect our rights. That direct question is not now before the court, it is only the question of the recognition of our grant and not its immediate location, as to the other parties, which is the important point in controversy. The evidence is that "Juan Gid received a grant of land at the same place from the Mexican government respecting those of Don Juan Garcia." This does not say that Garcia's land was outside of Gid's grant.

Under the circumstances and facts given, Garcia and Stevenson were obliged to make inquiries and know the whole truth as it then existed. The defendants now admit that the land they claim is within the boundaries of the grant recognized in their predecessors chain of title. It is not the question of the dispute of bound-

aries before this court but the existence, or non-existence, of the plaintiff's title that defendants seek to deny.

We submit that under the authorities they are estopped.

Haines v. *Haines*, 37 N. W. R., 563–6, Mich.
Littleton v. *Giddings*, 47 Tex., 109–118.
Magee v. *Chadron*, 30 Tex., 644–661.
Webb on Record of Title, 182.

Again this evidence of Ponce de Leon is of great importance to us in an other view. His affidavit being taken and filed in the office of the United States surveyor-general, is expressly made legal and competent evidence in our case by the fifth section of the act of 1891. Ponce de Leon was a prominent man, and, as shown by these same proceedings, was at the time, an important Mexican officer, political chief of Contonment Bravos. He was the secretary of the ayuntamiento of El Paso, and one of the commissioners who put Heath into possession. He was the leading spirit of the authority that made us our grant. He knew as much about our grant, its validity, the right of the Town Council under the law of 1823 to make it as any other man in Mexico. If this grant had been made without authority, if, in the language of the learned counsel, "the colonization law of 1823 confers no power upon the ayuntamiento to grant lands in the first instance to one individual colonist, or if the government of Mexico had denied this authority and sought to defeat Heath's grant on account of the jurisdiction of the Town Council to act in the premises, would not Ponce de Leon have known this? Would it not be impossible, save and except upon the theory of perjury, that in 1856 he would have sworn that Juan Gid *asked for and received a grant of land at the same place from the Mexican authorities?*" Here is the positive proof coming from defendants themselves; that Heath's grant was made with authority. The language of the witness not only presupposes, but proves authority. Heath received a grant of land from "*Mexican authorities*" are the words: that is, authorities authorized by Mexican law to make such a grant.

This evidence of a prominent officer and citizen of Mexico who had special knowledge of all the facts in the case, and was well informed upon the land laws of his country, should be given important weight by this honorable court.

U. S. v. *Philadelphia*, 11 How., 661.

And when taken in connection with our evidence, that the Bracito was always known and recognized in that country as belonging to Gid or Heath, the proof of our title is complete.

Fifth proposition. Resolution of departmental assembly alleging that law of 1823 was repealed, and that council acted hastily and with little wisdom in making the grant to Heath is an admission of the authority of the Ayuntamiento to make the grant.

Extract of the proceedings of the departmental assembly June 17, 1823:

"Next was read a letter from the ayuntamiento of El Paso and the accompanying report which it made to the president in regard to lands which it had given to the Anglo-American, Mr. Juan Gid, at his request, and another petition made to the same body by Senor de Albo asking for pasture land for a herd of cattle, sheep and horses, it being reduced to two sitios of a square league each. And the details of both petitions having been taken into consideration, after a full discussion it was decided that as to the grant of land made to the American, the ayuntamiento of El Paso should be reprimanded for the reason that that body had acted hastily and with little wisdom in giving away land that belonged to the people of that town, to the great injury of all its inhabitants; and, besides, the law of colonization at that time being repealed, and the said ayuntamiento to avoid making itself responsible for damages, which the stranger would claim if the families came to settle in this country, which he has offered to bring, should notify the aforesaid Gid through the medium of the representative of the United States, that the possession which was given him at the Bracito was given by reason of a doubtful interpretation and wrong understanding about the law of colonization already repealed, and that these lands belong te the jurisdiction of El Paso.

JOSE ANTONIO VISCARRA,
President."

"JUAN BAUTISTA VIGIL,
Departmental Secretary."

The departmental assembly does not deny that under the law of 1823 ayuntamiento had authority to make grants. But from what they said this power was conceded when exercised with wisdom, before the law was repealed. If the ayuntamiento had no authority in the premises then Heath, by bringing his colony to to the country, could not recover damages on account of the concessions of lands that the council "had given to the Anglo-American, Juad Gid." In that event Heath would be without remedy, but on the other hand, if the ayuntamiento had authority but only acted as the assembly claim after the law was repealed "in haste and poor judgment," then the title passed to Heath when grant was recorded and said grant could not be recalled, revoked or cancelled by any effort to give notice to Heath not to come to the country. If he did come it is admitted the ayuntamiento would be responsible for damages, or in other words that Heath's contract could be enforced. Here there was no question of damages involved—it was a question of title or no title—whether or not the grant to Heath had been made by lawful authority. We submit that this reprimand by the assembly to the ayuntamiento "*for the reason that that body had acted hastily and with little wisdom in giving away land that belonged to that town*" is an acknowledgment of the powers of the ayuntamiento to make grants. The assembly censure the council not for exercising the power to make grants, but the manner and occasion only of its making the grant. The assembly's statement that the council had given away the

lands, was an admission of its power to act if the law had not been repealed.

The reason assigned by the assembly for attempting to revoke this grant: 1st, use of poor judgment; 2d, that law was repealed; were neither valid in law, nor true in fact.

If the grant to Heath was made with poor judgment, that would not vitiate the contract. If, as they concede, the Ayuntamiento had jurisdiction, their discretion or use of poor judgment could not be inquired into. There is a distinction between setting aside a grant for want of power to make it, and trying to defeat a grant because imprudently made, and with poor judgment. The first is void for want of jurisdiction, while the second is valid *in toto* without power of correction,

Noble v. *Union River Logging R. R. Co.*, 147 U. S., 165, 176, 177,
Stimson Land Co. v. *Ranson*, 62 Fed., 426–430.

The objection is not that the officer had no jurisdiction or authority to act, but that he had no authority to act in the manner he did act. How or why the officer acted is not a matter to be inquired into by this court. The officer to increase the quantity of land was the judge of the qualifications of the applicant, and his decision was final unless fraud be shown on the part of the grantee.

Jenkins v. *Chambers*, 9 Tex., 167–230.
Ward v. *McKinney*, 25 Tex., 258–265–6.
U. S. v. *Arredondo*, 6 Pet., 729.

As we have said, the departmental assembly raises no question of jurisdiction; does not intimate that the ayuntamiento acted *coran non judice* except as it alleges the law was repealed. We have shown that the ayuntamiento had authority and that its action was *coran judice* , and this the assembly admits.

We submit that this action of the assembly in trying to defeat our grant under the pretext that the law had been repealed, was an exclusion of all other reasons for its defeat, and a full admission of the authority of the ayuntamiento in the premises. This is a clear case of the applicability of the maximum "*designation unius est exclusio alterius et expresion facit cessare tasitium.*" Designation of one is the exclusion of another, and that expressed makes that which is implied to cease, 2 Bouviers L. D., p. 123, Coke Litt. 210. We also affirm that this recognition by the legislature of Mexico of the fact and right of the ayuntamiento to have made the grant was and is pursuasive, if not conclusive, evidence of the intent and meaning of the law of January 4, 1823. If there was no such authority by said law vested in the ayuntamiento to make the grant, the legislative body of the state should and would have said so. It would have denied jurisdiction in the first place, and not have based its action on the repeal of the law, which had

not taken effect when our grant was made, and the exercise of little wisdom by the council in making our grant.

Bromville v *Cavayos*, 100 U. S., 138–142.

"A"—*Governors or departmental assemblys of territories under the act of January 4, 1823, and the laws of Mexico, as then existing, had no authority to approve or reject grants.*

It having been necessary to so carefully provide by express provisions in the law of 1824, that the grants made by the government should not be valid without ratification or approval, the fact that no such conditions are found in the law of 1823, it must follow that under this law the Ayuntamiento had the power to grant and confirm titles without subsequent approval, and that a provision of this kind embodied in a title executed and delivered to a grantee would be useless and unnecessary, and therefore void, and should be treated as surplusage. There is no provision in this act that grants should be sent to the governor and departmental assembly. They had nothing to do with the negation or approval of titles. The executive referred to in the act of January 4, 1823, is the chief executive and not the governor of the state or territory. The governors could not point out the particular provinces where lands were to be settled, this could only be done by the chief executive as provided in the act. They at that time had no jurisdiction outside of their own territories and none whatever over the public lands. That the right of eminent domain over the public lands was vested originally in the federal government of Mexico is not questioned. This subject is fully discussed in the case of *The Republic* v. *Thorn*, 3 Tex., 499–504.

"The confederacy of the Mexican states was not formed, originally, by a constitutional compact between several separate states, nor by a grant of powers originally vested in the several provinces which afterwards constituted the states of the union.

"The public lands of the U. S. of the north, before the acquisition of Louisiana and Florida, belonged originally to several states, and became federal property by purchase or voluntary cession from the states.

"But in the Mexican union the general government claimed, originally, the property in the public domain. It is true that, under former governments, the provincial authority had exercised certain powers of control over the public lands, but this was in subordination to the central or supreme authority of the country, whether vested in the crown or represented by the vice-royalty of New Spain, or the sovereign provisions governing juntas, in the emperor Iturbide, or the other authorities which succeeded, before the assemblage of the constituent congress which finally adopted the federal system, and out of the municipal subdivisions of the territory formed the states of the confederation."

Prior to the national colonization laws of the 18th of August, 1824, the states did not claim any right of control over the public lands.

The law of 1823 was national in all of its provisions, the government selected as its agent for the distribution of public lands the Ayuntamientos in their respective jurisdictions. But in 1824 a new system was provided by which all the vacant lands were declared subject to colonization, and that states were authorized to form colonization laws or regulations for their respective states in conformity with the constitutional act, the general constitution, and the regulations of the national colonization law. The power of disposing of the public lands was relinquished and ceded to the states, the general government, for colonization purposes, retaining control only over such lands as lay within the territory of the republic, and certainly not under the law of 1823.

The Republic v. *Thorn*, 3 Tex., 505.

The proposition has been frequently sustained by this Court:

"The grant is not set forth in the record, but we must presume that it was in the ordinary form of grants made by former governors of California under the Mexican colonization laws of 1824, *as under no other law were these governors empowered to make grants of the public domain.*"

Van Reynegan v. *Bolton*, 95 U. S., 33, 34.

U. S. v. *Vigil*, 13 Wall., 449–456.

Maxwell Land Grant Co., 121 U. S., 325.

"That the decree of the Spanish Cortes of 1813, *as well as all other laws of Spain in relation to the disposition of the Crown lands were inapplicable to the state of things which existed in Mexico after the revolution of 1820, and could not have continued in force there, unless expressly recognized by the Mexican Congress.* That the Spanish system of disposing of the public lands was so different from that provided for by the Mexican law of 1824 and the regulations of 1828, that they were repugnant and inconsistent, and that the former was repealed by the latter."

All decrees and regulations prior to 1820 are held inoperative upon Mexican grants.

U. S. v. *Vallego*, 1 Black, 541.

U. S. v. *Workman*, 1 Wall., 745–761–2.

U. S. v. *Vigil*, 13 Wall., 450. Affirmed by U. S. Land Court in *Hayes* v. *U. S.* Opinion by Justice Murray.

"B." It cannot be held as argued by the learned counsel that "the concession to Heath was annulled by the Mexican government," as no authority having any power in the premises even attempted to destroy our title. This land was in the National domain. Neither the States or Territories had any jurisdiction of the public lands in Mexico until after the law of 1824.

Leese v. *Clark*, 3 Cal., 23, and authorities above.

The Departmental Assembly having no jurisdiction over the subject-matter, their action or attempted revocation was of no effect. He who alleges that our grant was annulled must show an affirmative action by legal and competent authority. Here there was no actual annullment of our grant by any authority having jurisdiction. A grant is valid even if the power to disarm it existed, until actually disavowed by superior legal authority.

U. S. v. *Arredondo*, 6 Peters, 723–4.
U. S. v. *Clarke*, 8 Peters, 451.
And authorities above.
Sabariego v. *Maverick*, 124 U. S., 261, 280–293.
Jones v *Garcia*, 11 Tex., 186, 200, 210.

Three radical changes in the system of granting lands in Mexico were made in the period of two years; the first, February 24, 1821, when the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; then later when Iturbide was proclaimed emperor and and the law of January 4, 1823, was passed. Soon after Iturbide was dethroned and shot and the colonization law of August 4, 1824, passed by the same Cortes that had ordered the coronation of Iturbide. Most of Mexican grants were made under this last law, but the validity of our grant must be ascertained and determined by the act of 1823. It is important for this court to keep in mind these changes and how they were brought about, in order that we may the better ascertain what the power delegated under this law was, and wherein it differed from prior and subsequent laws.

Judge MURRAY, speaking of the mutations of these Mexican laws, said, in the case of *Leese* v. *Clark*, 3 *Cali.*, 23:

"Prior to the Mexican revolutions which produced the Plan of Igula, February 24, 1821, the unappropriated lands in this country constituted a part of the domain of the Spanish monarchs, who alone represented and exercised the sovereignty of the Spanish nation. The royal governors were the mere deputies of the king, and exercised the sovereignty in his name.

But on the 24th of February, 1821, the relation between Mexico and Spain ceased, and the sovereignty became vested in the Mexican nation; and since that time no valid alienation could be made in any of the territories of Mexico except by an act of Mexican soverignty. The royal decrees, regulations and usages ceased to have any effect whatever as to subsequent grants of lands."

This point was determined by the Mexican congress, in a case which arose shortly after the independence of the government, and has ever since been acquiesced in. On the 17th of January, 1821, the elder Austin obtained an inchoate grant of lands from the royal governor of Texas.

On the 19th of August, the Mexican governor of that province (Martinez), assuming the powers properly exercised by the royal governors, modified the grant in favor of the young Austin.

Had the royal laws and usages still continued to retain their force the acts of Martinez would have been valid, but the Mexican government at the same time it recognized the act of the royal governor as valid, because done before the change of sovereignty, refused to confirm the act of its own governor, done after the change on the ground that the sovereignty could be exercised only by the Mexican nation. It was then discovered that a new law was necessary. The subject attracted public attention, and on the 4th of January, 1823, a general law on the subject was promulgated, giving right to ayuntamientos to make grants in certain cases, but Iturbide being shortly aferwards deposed, congress on the 11th of April, 1823, suspended that law, and on the 18th of August, 1824, as it was then organized, enacted a general colonization law, prescribing the mode of granting public lands throughout the Mexican territory.

White's Recop., 561, 8, 71, 76 and 82.

Therefore, the governors having no jurisdiction to grant, confirm, approve or reject titles to public lands under this act, the fact of sending our grant to the territorial government and the subsequent action of the departmental assembly was a nulity, being unwarranted and contrary to law. Our title evidenced by a proper conveyance could not be defeated by a condition not authorized by law. This point has been directly settled by the Supreme Court of Texas.

Swift v. *Herrera*, 9 Tex., 263–282.

The commissioners authorized to grant lands put a petitioner into possession, deciding that under the 12th article of the law of 1825, he was exempted from making any payment to the state. The governor to whom the papers were afterward sent, according to law, for approval, confirmed the title subject to the payment of certain dues to be made to the state. The grantee did not pay said dues. Held:

"The governor had no authority under the act to impose as a condition of the grant the payment of dues. The assumption of power in imposing such a condition is unwarrantable, and therefore void. The grant itself was issued by competent authority, in the legitimate exercise of power, and is not vitiated by a condition which in contemplation of law is a nullity."

Affirmed in *Fulton* v. *Bayner*, 18 Tex., 50.
Mott v. *Reyes*, 45 Cal., 382–9.

Unwarranted, illegal, or void conditions are nullities.

Barkdale v. *Elan*, 30 Miss., 964.
Weatherby v. *Weatherby*, 13 S. & M., 685.
Rogers v. *Sebastian Co.*, 21 Ark., 440.
Adair v. *Co. of Logan*, 11 Sec., 339.

Therefore " the proceedings of the Departmental Assembly left the title as it was before its action.

Mott v. *Reyes*, 45 Cal., 389.

" *C.*" *Our grant was not upon a condition precedent of approval Under the law of 1823 all such conditions were illegal and void. What was done or said by letter or otherwise after the papers were delivered to the grantee or recorded by the ayuntamiento, could not in any way effect our title. If the ayuntamiento had a right to make a grant to a colonist with the approval of the Departmental Assembly, as it is shown it had by the grant to Lerma, see p. 56 of our argument, then it must follow that body had the authority to make the grant to Heath, without such approval.*

Nothing sufficient to make a condition can be found in the title delivered to Heath. According to the translations filed it is said " with the supreme will of the governor, to whom report will be made, his petition is admitted and his proposition accepted." We are informed that the original is " that saving the decisions of the general government, etc." These words according to either interpretation, must be construed strictly, as a condition precedent can be created only by clear and positive words, did not prevent the vesture of title in Heath. The grant was made without any attempt to limit the granting clause with any conditions whatever. We must take the deed as it is.

Conditions are not favored either in law or equity and it is held " whatever words are relied on as creating a condition, must not only be such as of themselves would create a condition, *but must be so connected with the grant as to qualify or restrain it.*"

Leading C. in Am. L. of R. P., Vol. 1,p. 124–136–143.
Laberee v. *Carlton*, 53 Me., 211.
Wheeler v. *Walker*, 2 Conn., 196.
Cluten v. *Washburn*, 46 N. W. R., 555–6.
Curtis v. *Board of Ed.*, 23 Pacf., 98.

Again, as shown by our argument, page , the governor having no authority to make or affirm grants, this provision was void and therefore of no effect, and the Town counsel could not delegate its authority to grant to any one, or make its grants contingent on the will of a stranger to the act of 1823.

History, of which the court must take knowledge, shows that a revolution was taking place, and at or about the time our grant was made, Iturbide, the emperor, was dethroned, and the laws passed under his reign repealed and abolished. Here was a complete and successful revolution, destroying and overthrowing the powers that had made us our grant. Surely this had the same effect as the change of property from Mexico to the United States, and it is clearly settled that a change of one government to another by revolution or treaty excuses all conditions subsequent;

nothing done or omitted to be done afterwards will work a forfeiture.

Hornsby v. *U. S.*, 10 Wall., 224–239.
Sutter v. *U. S.*, 21 Howard, 170–8.

Non-fulfillment of conditions hindered or prevented by a revolution will not work a forfeiture of title.

U. S. v. *Vaca*, 18 How., 556.

Where the performance of a condition subsequent was rendered impossible or unreasonably burdensome by cession of the territory to another government a court of equity will relieve from the condition.

U. S. v. *Arredondo*, 6 Pet., 691.

This revolution prevented the approval of Heath's title by the emperor who made it, he being dethroned. If his title as we claim needed no approval then it remained good and perfect, but on the other hand if approval was necessary (which we deny) then undoubtedly the revolution and repeal of the law of 1823 disabled Heath from obtaining a definite title, but he was not divested of the right of property he had acquired by the original grant. In either event the grant was relieved of the conditions subsequent and became absolute.

Fremont v. *U. S.*, 17 How., 541, 561–2.
U. S. v. *Reading*, 18 How., 1.

The point that we argue, namely, that our grant was not upon a condition precedent, has been directly settled by high authority. The grant to Hornsby had in it the express words:

"*Subject to the approval of the departmental assembly*," yet it was held "there is nothing in the objection which touches the validity of the instrument at the time it issued, *and the clause subjecting the grant to the approval of the departmental assembly did not prevent the title from passing to the grantee upon the execution of the instrument.*"

Hornsby v. *U. S.*, 77 U. S., 224–238.

The grant to Sutter contained similar words. Held:

"Nor did the clause subjecting the grant to the approval of the supreme government and departmental assembly prevent the title from passing." That approval was not a condition precedent to the vesting of the title. The view we have expressed of the condition annexed to the grant of Sutter and the provisions subjecting it to the approval of the supreme government and departmental assembly, are in accordance with the decisions of the Supreme Court of the United States in the *Fremont and Reading* cases. In both of these cases the grants were subject to conditions and to the approval of the departmental assembly, and neither received such approval. And the court held the conditions subsequent, if the approval of the departmental assembly and the supreme government were a condition precedent, then no title whatever passed by the grant of the governor. The grant would in that case be

only the first movement towards a title, and be no more operative as a conveyance than a bill passed only by one house of the legislature would be operative as a law. The consequence of such a position would be startling, and it would be impossible to estimate the confusion and injury the consequences of such a position would lead to, carried to its necessary and legal results. But such approval, as we have already shown, was not a condition precedent. The title passed to Sutter by his grant; an estate vested in him, subject, it is true, to be defeated by the action of the Mexican government by direct rejection (speaking of the law of 1824) or in case of non-compliance with its conditions, by precedings to that end."

Ferris v. *Coover*, 10 Cal., 589–617–8–9.

The Sutter title was several times sustained by the Supreme Court of the United States. In *U. S.* v. *Reading 18 How.*, 4, the proposition that the grant was provisional only, having been made subject to the approval of the departmental assembly, and as that had not been given, that it passed no such interest in the land to Reading as entitled him to a confirmation of the grant, was denied. From these and other authorities it must follow that what was said by the town council in letter to governor attempting to engraft on our title a condition precedent of approval as well as what the departmental assembly did subsequently, can not in any way affect the title that had been vested in Heath. This letter is no part of our grant. It is a separate and distinct paper. Is not part of our expediente, or of the record at El Paso, or of the testimony given to Heath. The grant was complete when recorded, and the following certificate of the secretary was added before the letter was written:

"Copy from the original in the record book of the acts of this honorable corporation, kept in my office, to which I certify.

JUAN MARIA PONCE DE LEON, *Secretary.*

The enrollment was made prior to this certificate being written, and copy given to Heath. Then a copy of the record thus made afterwards sent to Santa Fe. What was there said, written or done was a nullity, being illegal according to the authorities.

There are three methods only of annexing a condition to a grant:

1. May be inserted in the same deed.
2. It may be endorsed on same deed before delivery.
3. It may be contained in another deed delivered at same time.

1 Robb Abst., 413–414.
2 Sand, 48.

2d "*a.*" Deed once enrolled cannot be recalled or annulled.

Titles to land may be acquired by private deeds; second, by public grants, patents, acts of the legislature, or by a treaty. These second grants are matters of record. All grants of record

are complete, final, absolute, when recorded. Neither the land officers nor the executive can recall or correct a title for land when once enrolled. This being the final act which closes the transaction, their power is gone. If fraud, mistake, error or wrong has been done, that must be inquired into by a bill in equity or by some other judicial proceedings. This is true of the grants of all nations, especially of those made by Mexican, Spanish or French governments. These instruments of title were always recorded in some public office whose officers were authorized to make grants, and once enrolled, the authority of said officers over the land and over the title to the land conveyed ceased. They could not recall, cancel or annul any grant once made and enrolled.

U. S. v. *Schurz*, 102 U. S., 378–402.
Moore v. *Robbins*, 96 U. S., 530–1–2–3.
Noble v. *Union River Logging Co.*, 147 U. S., 165.
Stimson Land Co. v. *Ransom*, 62 Fed., 426–429.
6 Rights, Remedies and Practices, Art. 2696.
U. S. v. *Stone*, 2 Wall, 525, 335.

Congress has no power to nullify titles confirmed by the authorized agents of the government.

Reichert v. *Felps*, 73 U. S., 6 Wall, 160.

As there was a vain effort of the revolutionary government that succeeded Iturbide to defeat our title by trying to undo what had been done in the matter of our grant, the proposition, we argue, becomes a very important point in our case. We will therefore sustain it by a full quotation from high authority.

That a deed from a private individual must be delivered before the title passes is an elementary principle of law, but this is not so with a deed from the government or a public officer, it takes effect when recorded, it is then the power of the government over the land conveyed ceases.

In the case of *Bicknell* v. *Comstock*, 113 U. S., 149–151, a patent was issued to Bicknell, and recorded in the land office at Washington, D. C., and sent to Fort Dodge, Iowa, May 1, 1859. In June, 1870, the commissioner of the general land office ordered return of this patent to his office; on its receipt he tore it up and mutilated the record thereof in the general land office; held that this action was utterly unlawful, and left the patent of 1869 to Bicknell in as full force as if no attempt to destroy or nullify it had been made, is a necessary inference from the principle established by the court in the case of *U. S.* v. *Schurz*, 102 U. S., 378. That principle is that when the patent has been executed by the president, and recorded in the general land office, all power of the executive department over it has ceased. In the case of *U. S.* v. *Schurz*, 108 U. S., 378, the distinction between the transfer of title by private deed and by matter of record is pointed out, and the interesting and forcible opinion of Judge Miller, sustained by

authorities from Blackstone down to that date, holds the propositions; that patents are perfect grants without the prerequisite of their delivery; that when once recorded can only be revoked or annulled by *scire facias or other judicial proceedings;* that title to land passes at date of patent though the patent still remains in the land office, without any actual transmission of it to the grantee. That the title, in the case of state or national grants, passes when the last act in the services essential to the transfer is performed, and that is when recorded. Then the land has ceased to be the land of the government, and the powers of the officers to deal with it have passed away.

In the case of *Donner* v. *Palmer*, 31 Cal., 500, which was affirmed in *The U. S.* v. *Schurz*, 102 U. S., *sup.*, and in *Jick* v. *Diaz*, 37 Cal., 442, it is said that the same rule as applied to grants to patent was also held to apply to grants made under the Mexican government, that when once entered in the books kept by the alcade or other public officer making grants the power of the government over the land conveyed ceased.

Donner v. *Smith*, 24 Cal., 114.

"Neither the land office nor the executive can recall or cancel a patent for land which has been duly issued. If a patent ought to be rescinded on the ground of fraud, or for some other such good reason, the remedy is by bill of equity in the name of the United States. In cases in which the officers of the land department have acted within the scope of their authority, all right to control the title or decide on the right to the title has passed from the land office."

Moore v. *Robbins*, 96 U. S., 530.

Johnson v. *Towsley*, 13 Wall., 85.

"The government cannot attain the same end indirectly by a recital in a second patent that there was a mistake in the issuance of a prior patent, the first is conclusive until properly set aside."

Jackson v. *Lowton*, 10 John., 23, 6 Am. Dic., 311.

"If in proceedings of a grant to two, one of the grantees, before the grant is complete, should appear before the alcade and consent to renounce his interest, decline the same and request it to be made to the other grantee alone, and this is done, it may be shown by parol testimony, provided the alcade has made indorsements thereon. But, if the alcade has made the grant to two persons jointly and has delivered possession and completed the proceedings, the title vests in the two jointly, and an indorsement then made by the alcade on the grant, that one of them has renounced, and that the grant shall inure to the benefit of the other, does not divest the title of the one said to have renounced."

Lick v. *Diaz*, 37 Cal., 437–447, 30 Cal., 65.
Affirmed in 46 Cal., 479.
Becknell v. *Comstock*, 113 U. S., 149.

3d "A."—Our grant was not annulled by legal authority, or otherwise.

The departmental assembly did not attempt to annul the title by any judgment or decree. Having learned, June 17, 1823, that the law was repealed, for this reason they said the land still belonged to the jurisdiction of El Paso. Neither did the general government revoke our grant; no record can be found to this effect. Therefore, there being no decision of any authority having jurisdiction in the premises annulling what had been done, our title remained just what it was in the beginning — a valid right evidenced by judicial possession and proper *espedentia*. If our grant was to be approved by the general government (and this we deny), it was the duty of the grantor and not the grantee to see that the papers were sent there. No neglect or failure in this respect can be visited upon us. He who alleges that our title is not good must show want of authority in the grantor, or that the grant we received was subsequently annulled by competent authority.

U. S. v. *Arredondo*, 6 Peters, 723–4.
Mott v. *Reyes*, 45 Cal., 579.

"*A grant under general power should be considered as valid, even if the power to disavow it existed, until actually disavowed. It cannot be doubted, a grant not actually annulled by superior authority should be received as evidence of title.*"

U. S. v. Clarke, 8 Peters, 451.

"The divesture of the title by the government can only be accomplished in the mode authorized by law."

Doswell v. *De Le Sanger*, 20 How., 29–34.
Johnson v. *Tousley*, 13 Wall., 76–85.
Jones v. *Montes*, 15 Tex., 351–354.

"It is held that a legislative grant, competently made, vests an indefeasible and irrevocable title. There is no authority or principle which could support the doctrine that a legislative grant was revocable in its nature and held only *devente bene*. Nor can the legislature repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws and by such repeal vest the property in others without the consent or default of the owners."

Terrett v. *Taylor*, 9 Cranch, 43.
1 Vol. Kent Com., 416.

"If land is granted by a statute, its legislative power is incompetent to annul the grant and grant the land to another."

U. S. v. *Arredendo*, 6 Peters, 737.

Our case in principal comes within the ruling of the court in *U. S.* v. *Reading*, 18 How., 7. Speaking of approval of Departmental Assembly, the court said:

"A right and title passed by the governor's grant, but its definitive validity was suspended for the approval of the assembly: and so it continued to be suspended, until its approbation had been given when the title became definitive. But, if that was refused, it did not take away, nor in any way qualify, the grantee's title, but only kept its final validity in suspense until the grant had been rejected by the supreme government of the republic; it being the duty of the governor, after its rejection by the assembly, to forward the documents of title to the supreme government for its decision. Where the archives of the territory of the Californias do not show that the governor's grants of land had been sent to the departmental assembly, or that, having been sent, they had been rejected, and that after such rejection they had not been sent, by the governor making the grants to the supreme executive government for its final decision—the titles of the grantees are just what they were in their beginnings, and are sufficient, now that the territory has been transferred to the United States, for confirmation under its statute of the 3rd of March, 1851."

Much more is this rule true when, as in our case, the law of 1823 not requiring approval, our title being definite and valid in the first place, did not remain suspended, and not being reversed or rejected by authoritive official act of the Mexican government is a complete and perfect grant to-day.

Such a grant is equivalent to a patent in the U. S. and a "patent" says the court in *United States* v. *Stone*, 2 Wall., 525, "is the highest evidence of title and is conclusive as against the government and all claiming under junior patents or titles, *until it is set aside or annulled by some judicial tribunal.*"

Moore v. *Robbins*, 96 U. S., 533.

The ayuntamiento was the agent or trustee of the general government to issue grants under this law, and as such could not delegate the right to make grants or the power to revoke or annul them.

A delegated authority cannot be delegated.

Shankland v. *City of Washington*, 5 Peters, 390.

Pearson v. *Jamison*, 1 McLean, 197.

Pendall v. *Rench*, 4 McLean, 259.

The powers and duties of a trustee cannot be delegated unless there are express directions to that effect in the trust.

4 Rights R. & P., p. 3,455, Sec. 2,027.

City of St. Louis v. *Priest*, 88 Mo., 612–614.

"In all cases of delegated authority, when personal trust or confidence is reposed in the agent, and especially when the exercise and application of the power is made subject to his *judgment or discretion*, the authority is purely personal, and cannot be delegated to another unless there is special power of substitution. Such is the rule in relation to powers created by deed or will, and *a fortiori* is it so where the authority is conferred by act of the legislature."

Lyons v. *Jerome*, 26 Wend, 485.

The ayuntamiento was to decide whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public individuals, and could not delegate to the assembly the right to decide these questions, even though under the law the assembly had the authority to approve the grant, which we deny.

U. S. v. *Vigil*, 13 Wall, 449–451.

4 "*a*." Our grant was a perfect vesture of title which could not be annulled

In making this deed the Ayuntamiento acted judicially. It was its duty to determine if Heath was a fit person to receive the bounty, whether the facts existed that would warrant granta and whether all antecedent acts has been performed. It could not evade or shift this duty. Any attempt to leave the matter to the will of the Governor was unwarranted and therefore void. That it did decide all these questions is evidenced by the deed and possession given by Heath. Therefore the deed must stand the attempted condition being illegal and void must be taken as surplusage.

Ming vs Foote, 33 Pacif. 521.
Green vs Baker, 66 N. W. 1035.

The phase that "with the will of the Governor" no more defeated this grant than the entry by the judge in a judgment against the defendant and in favor of the plaintiff for $1,000 "upon approval of the governor of the state" would defeat said judgment.

Quoted and affirmed at length in case of *Gonzales* v. *Ross*, 120 U. S., 626.

As a justification for what the departmental assembly did, it will not do to say, that all the ayuntamiento could do under the law of 1823 was to have issued a concession, and that all Heath got was a permission or license to occupy this land when his colony came, and that, therefore, the government had right to annul this inceptive title. That the grant made in fact was *in presenti* and a fee simple title we will show hereafter. And we submit that colonization titles under the Mexican laws, especially that of 1823, were perfect titles in the first instance, but charged with conditions as to occupation and settlement. The judicial delivery or possession by the officer or agent appointed for that purpose always passed the livery of seizen by adding the *jus in re* to the *jus ad rem*, forever designating and severing from the public domain the tract granted

by measuring its extent and establishing its boundaries. Titles issued to colonists under the colonization laws of Mexico were of an entirely different character from the concession issued by Spain, of which we have knowledge under the Louisiana purchase. Under the Mexican law the extension of grants by a commissioner or town council completed the title without any other act of the government, notwithstanding the impositions or conditions subsequent. Under these laws the title of possession was a final title, vesting the fee absolutely in the grantee. Conditions were annexed, but they were conditiens subsequent, upon the non-performance of which the titles were subject to forfeiture, and might under the 23d section of the act of 1823 be regranted to another, but until which the fee or proprietorship was in the grantee.

Ganzales v. *Ross*, 120 U. S., 626.

Hancock v. *McKinney*, 7 Tex., 384.

U. S. v. *Castillero*, 2 Black, 231–350.

Fremont v. *U. S.*, 17 How., 557.

Ferris v. *Coover*, 10 Cal., 589.

In the case of *White* v. *Holiday*, 17 Texas, 613, speaking of grants to colonists, the court said:

"The title introduced in evidence was a final title, vesting the fee, with the possession, in the grantee. It is less formal in its statements and recitals than the colonists' titles usually are; but it is not, on that account, the less effectual to pass to the grantees the ultimate proprietorship of the soil. It adjudges to the grantees the title and possession of the land, which had been surveyed to them by a surveyor appointed for that purpose; the commissioner recites that he put the grantee in possession, 'performing all the acts of true possession, and he formally executed to them title.' There remained, *no act to be done on the part of the government to complete the title, no further act of confirmation or investure of title was contemplated or required by the laws; and nothing further was required to vest in the grantee a perfect title.*"

The proposition which we present must follow. There is nothing in the law of 1823 that warrants the conclusions that the departmental assembly could act as a court of appeals or error. In this case no appeal was given by the act of 1823. And it is held:

"If no appeal is given from a final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only for fraud in the party who obtained it."

Gregnon's Lessee v. *Astor*, 3 How., 339.

U. S. v. *Arredondo*, 6 Peters, 728–9.

In the case of *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S., page 654, it is said:

"The Supreme Court did, indeed, say in relation to this matter that the

commissioner had no authority to vacate the entry, and that any order that he might have made did not affect the rights of Egan, and cited to the proposition the case of *Brill* v. *Stiles*, 35 Ill., 305, where it was held that the mere fact that entry has been declared void by the Commissioner of the General Land Office does not have the effect of vacating the entry."

In other words, the court was of the opinion that the commissioner could not, without notice and arbitrarily, deprive a person of land lawfully entered and paid for, as was ruled in *Cornelius* v. *Kessell*, 128 U. S., 456–461. In this last case, on page 461, it is said, in addition:

"But the power of supervision and correction is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony; or without authority of law. It can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a lawful interest in the property, add the right to the patent; therefore, he can no more be deprived of it by order of commissioner than he can be deprived by such order of any other lawfully acquired property. Any deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

In *U. S.* v. *Virgil*, 13 Wall., 451–2, in substance it is said:

"*The ayuntamiento was to decide under the provisions of this law whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public or individuals. The Mexican government having chosen to intrust to it the execution of its policy on the subject of public domain, it was not for the assembly to interfere with the execution of that trust, when the law gave them no authority to meddle in the matter. Whether this was wise or not, be this as it may, it was the undoubted right of the Mexican government to decide the question for itself, and this court cannot be required to go further than to give effect to that decision.*"

But the departmental assembly merely tried to undo without authority that which another body acting with authority in the premises had done.

The law warranted the action of the ayuntamiento, but neither the letter nor spirit of the law sanctioned the right of the assembly to reverse its actions. Here is a conflict of authority. Which must stand? We submit that if the ayuntamiento had authority in the premises as shown by the statute and decisions, and virtually conceded by the assembly, which tried to reverse what had been done in error of judgment, then our grant is to-day valid and should be confirmed. This must be true if the ayuntamiento had jurisdiction to make our grant as they did. It is an axiomatic proposition that when jurisdiction has attached, whatever error may subsequently occur in its exercise, the proceedings being *coran judice*, can be impeached collaterally only for fraud. In all

other respects it is as conclusive as if it were irreversible in a proceeding in error.

McNitt v. *Turner*, 16 Wall., 352.

If the assembly acted without jurisdiction, then its action is void. This question must be determined alone by the act of January 4, 1823. There is not a word, syllable or sentence IN THIS act to authorize the submission of our grant to the departmental assembly. This must be the test of their action. The power to hear and determine a case is jurisdiction. If the law confers the power to render a judgment or a decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case is judicial action by hearing and determining it.

Gregnon's Lessee v. *Astor*, 2 How., 318–337.
Vorhees v. *Jackson*, 10 Peters, 449.
Florentine v. *Baston*, 2 Wall., 210–216.

Both the ayuntamiento and the assembly claimed a right to do what was done. The authority of the first was clearly recognized by statute, that of the second was not. The question here then is the distinction between matters of error and matters of jurisdiction in the granting of title to real estate. This distinction is clearly recognized by the authorities last above quoted and others.

Mohr v. *Manierre*, 101 U. S., 417–421.
Holmes v. *Oregon & Cal. R. R. Co.*, 9 Fed., 232–3.
Leese v. *Clark*, 18 Cal., 535–273.

If the council made mistakes in the exercise of bad judgment, as the assembly claimed, that was a matter that could not be inquired into after our title was once recorded. The record shows that objections were made during the progress of the proceeding, that they did not go in haste, but made faithful investigations, finding and reporting that there were no reasons why they should undo what they have already done in the matter of the grant to Heath.

That the ayuntamiento had authority and jurisdiction in the premises under the law of 1823 we have shown, therefore the words of the courts in the cases of *Hancock* v. *McKinney* and *U. S.* v. *Arredondo*, are very applicable and important in this case.

"Here there is no question as to the authority of the officer to make a grant. The question is whether he erred in a manner of exercising his authority. We are not prepared to say he did, but if he did, it was a mere error in judgment and the act done was not against law, being within power and authority conferred, it would in general principles be valid and binding until reversed by some competent revising tribunal."

Hancock v. *McKinney*, 7 Tex., 441.

"It is an universal principle that when power or jurisdiction is delegated

to any public officer or tribunal over a subject matter, and its exercise is confided in his or their discretion, the acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the authority and power conferred."

U. S. v. *Arredondo*, 6. Pet., 729.
Jenkins v. *Chambers*, 9 Texas, 230.

"Even if the law is susceptible to two constructions, and the officer whose function it was to act under the law having decided, his decision could not now be disregarded."

Ruis v. *Chambers*, 15 Texas, 587-590.

5 *a*. *Law of 1823 not repealed when our grant was made.*

What the departmental assembly said of our grant, as to the law being repealed, etc., did not affect our rights, neither does it afford any light by which the court should determine our claim as against the positive laws of that nation.

"The rights asserted by the inhabitants of the territory to their property depend upon the concessions made by the officer of the former government having at the time the requisite authority to alienate the public domain and not *upon any subsequent declaration of Mexican commissoners.* Rights of property depend on a *legal and judicial* construction of the statutes existing when they vest not on a legislative construction by a subsequent declarative act.

Hunt v. *Hunt*, 37 Maine, 333.
U. S. v. *Yorba*, 1 Wall, 422-3.

As a matter of fact the law, this act of Jan. 4th, 1823, was not repealed when our grant was made. April 3d, 1823, the second petition of Heath was filed and accepted by the ayuntamiento. The final act ended April 25, 1823, and the title on that day became vested *eo instanti* in Dr. Heath. April 8, 1823, the sovereign congress repealed or suspended the colonization law of 1823.

Early Law of Texas, p. 46-34, Act of decree relating to Austin's colony.

But this repeal or suspension had not taken effect when our grant was made, as no publication of said act had been or would have been made at El Paso at that time. Laws of Mexico did not take effect in any part of the country until they had been promulgated or published there.

L. I. Tit., 2 book, 3 Recop. Novissima.
Houston v. *Robertson*, 2 Tex., 1-28.
Conzales v. *Ross*, 120, U. S., 605-616-6.

Laws of Mexico of no validity until published.

"Section 7. Promulgation of the law. But the sanction of the law is not the promulgation, as some have believed. The sanction necessarily pre-

cedes the promulgation, the former is the royal approval of the law and the other is the mode of making the law known to the people, and to make it mandatory for them, because no one can act according to a rule which is not known. *The legislative act, although invested with all the force of which it is capable by the sanction, is not, nevertheless, effective law until it is promulgated.*

VIII. Promulgation, then, must precede in order that laws be binding and may be executed (*law* 12, *title* 2, *book* 3, *Novissma Recopilacion*). Promulgation is the act by which laws are published to the world, it is the living voice of the legislator, and it is within the province of the executive which provides that it shall be made throughout the land by edicts or by proclamations according to the customs of the place.

Escriche, under head of Ley.

A law is binding so soon as it is promulgated, unless the time at which it shall begin to be binding is expressed in the law, as it sometimes occurs; but until it is promulgated it has no binding force, because it does not exist for the people except by publication."

Escriche, under head of Promulgacion.

El Paso was situated more than fifteen hundred miles from the capital of Mexico, where the repealing act was passed; with no railroads or telegraphs, and bad roads, and all means of communication difficult and dilatory, it was utterly impossible for said law to have been published at El Paso when our grant was made. The supposition is that the law was published in a reasonable time, and under the circumstances of the case, reasonable time was nothing short of several months. The record shows that the act of January 4, 1823, did not reach El Paso for publication until March 2, 1823. The presumption is that the repealing law was not published any sooner. In the case of *Gonzales* v. *Ross*, a repealing law was passed at Moncloia, March 26, 1834, two hundred miles from Dolores, the place where land, on April 18, 1834, was granted to Gonzales: Held, there was no presumption, and it was not probable, that the act of March 26 was promulgated at Dolores prior to the 18th of April.

In the case of *Houston* v. *Robertson*, 2 Tex., 128, which was affirmed in *Gonzales* v. *Ross*, the court sustained a title granted under a law that had been repealed for five months, saying that on account of the unsettled condition of the country, like it was in our case, there was no presumption that the law had been promulgated. Therefore it is absolutely conclusive that the repealing law in our case was not published when our grant was made. On June 17, 1823, when the departmental assembly passed the supposed nullifying act, the repealing law of April 8, 1823, was then made known to them. They only say the law was repealed, they do not state when it was published, or that it had been promulgated at El Paso prior to the grant. This was then a declaration of the legislature of a province that an act of congress of the nation took effect when passed and not when published, as provided by positive

law. To show that this is an absurd proposition needs no citation of authorities. It must be conceded that when it is provided for by statute, as it was in Mexico, that laws did not take effect at any place until published there, then it is a condition precedent that all laws are void until legally published.

Sutherland on Statutory Construction, 129, 130.
Cooley's Constitutional Limitation, 6th Ed., 189, 190.
Welch v. *Battern*, 47 Iowa, 147.
Cain v. *Gode*, 84 Ind., 209.
Clark v. *Janesville*, 10 Wis., 119.

It is a well established principle that the repeal of a law does not take effect until published, and that all acts done in the meantime under law are valid and binding.

Allerton v. *Roberson*, 1 Dall, 8.
Morgan v. *Still*, 5 Binn, 28.
People v. *Trinity Church*, 22 N. Y., 44.

SECOND POINT.

Heath's grant being made and located according to law, was duly recorded within the archives of Mexico, as required by the treaty of Guadalupe Hidalgo and the decisions of the court of the United States.

The record of our case presents every link in the chain of perfect title. These several papers; the petition with decree approving the same, the order of reference to proper officers to survey and put petitioner in possession, report of these officers of their action in conformity to the order, with a complete and accurate map or draft of the survey of the land granted, the council's acceptance of said report, the decree of concession, all of which was entered in the record book of the acts of the honorable corporation of El Paso, and copies or duplicates of the same sent to both the governor of the province and the grantee, constitute a complete expedient within the meaning of the Mexican law.

U. S. v. *Moreno*, 68 U. S., 400–404.
U. S. v. *Knight. Adms.*, 1 Black, 245.
Hornsby v. *U. S.*, 77 U. S., 225–335–6.
U. S. v. *Morant*, 123 U. S., 335.

"The record of the grant made by the Ayuntamiento of El Paso called the protocol, the certified copy sent to the governor at Santa Fe, as well as the one given to the grantee, called the testimonials, are duplicate originals certifying the title to the land, and are evidence of such in any court.

"The copies made by the Spanish commandant from the protocol and certified to by him to be true and genuine, would be received in evidence in the courts in Spain as possessing equal claims to credit as the primordial or originals. For the same reason that those like these are certified to by

the same officer whose attestation gives authenticity to the protocol, and who is charged to preserve it. 2 Escriche Dic. de Leg., 185, and this court has uniformly received them as having the same authority."

U. S. v. *Davenport's Heirs*, 15 Howard, 1-6.
U. S. v. *Wiggins*, 14 Peters, 334-345.
U. S. v. *Peralta*, 60 U. S., 343-5.
Tex. Mex. Ry. Co. v. *Locke*, 12 S. W. R., 80.
Trinity Co. v. *Pincard*, 23 S. W. R., 720-3.

The learned counsel in court below argued: "Heath's grant is not valid because not duly recorded in the archives of Mexico." That our grant was nowhere recorded in Mexico, that its filing with the town council of El Paso del Norte and at Santa Fe in 1823 did not meet the requirements of the law, and they said:

"No record of a grant to Heath is found among the archives of New Mexico. This was not a record of the grant but a filing of the papers evidencing the incipient concession of the land. The record of the grant would be the expediente conferring the definite title. Nor would papers of any nature fouud among the records of the Ayuntamiento comply with the requirements of the treaty for a due record of the grant."

They seem to not have read the record in this case. If they had, they would have found, first, that our grant was in the United States Surveyor General's office in New Mexico and is No. 410 of the OLD SPANISH AND MEXICAN ARCHIVES. Second, that this grant is "a copy from the original in the record book of the acts of this honorable corporation. Juan Maria Ponze de Leon, Secretary." See page 170 of the record and page of our argument.

We submit these papers are evidence sufficient to establish the validity of our claim. The records at El Paso del Norte were mostly destroyed by the American soldiers in 1846-7. This fact has frequently been established, especially in the case of Juan Garcia and Hugh Stevens for a confirmation of a supposed grant for a portion of this land. See No. 6 claim 32 in the territory of New Mexico, report of Mr. Sandridge, p. 24-147.

This explains why the record cannot now be found at Juarez, Mexico. But it would be useless to get a copy from there if we could. It would only be the same as what is now in the public records—a copy, or one of three original duplicates of our grant. These papers having been handed down from the old Spanish and Mexican archives and now found in the United States Surveyor General's office for New Mexico, we submit are proper evidence under the act of 1891 and other laws of the United States. "All papers found in the Mexican archives in the custody of the Surveyor General of the United States are always evidence." 77 U. S. 235; 68 U. S. 404. In Perchemain's case, 7 Peters, 85, it was decided by the court that a copy of a Spanish grant, certified by a government secretary could be given in evidence without account-

ing for the non-production of the original, and this on general principles which did not require the aid of legislation.

U. S. v. *Wiggins*, 14 Peters, 345.

The expediente consisting of the petition, plat, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican Government is as much an original document as the grant, delivered to the grantee, and copy of the same in evidence.

Gregory v. *McPherson*, 13 Cal., 562–573–4.

Here, then, it is held that a copy of a grant *filed* in the archives of the Mexican Government, as ours was, is evidence, but we have not only the evidence that our grant was filed, but also that it was recorded "in the record book of the acts of the honorable corporation." This is proved by the certificate of the secretary as we have shown, and by the laws of Mexico at the time. Law 16, book 4, title 9, it is required that every act of the Ayuntamiento be recorded in a book kept for that purpose. It is presumed this law was obeyed.

"Such records and filed copies thereof have always been esteemed the highest and most satisfactory evidence of the facts which they recite because they are made by the direction of the law and are of public concern, and because they are made under the sanction of an oath and made at or about the time the acts which they recite transpired. They are retained in the custody of the functionary or department by which they are required to be kept, and are so retained for the express purpose of making them permanent and primary evidence of the transactions of the government. (1 Greenl. on Evidence, sec. 483.) Such a record can under no circumstances be called secondary or subordinate evidence, for there is and can be from the very nature of the case no higher evidence of the facts which it recites."

This question was discussed in the case of *Gregory* v. *McPherson*, 13 Cal., 570:

"It is true that it arose in relation to a grant made by the Governor, but we apprehend, for the reasons already suggested, that no distinction can be made between grants of that character and those made by Alcaldes. On the score of being official or authentic documents, which is the ground of their admission as evidence, they stand on a level. In that case a certified copy of the grant signed by the Governor and countersigned by the Secretary of State, annexed to and forming a part of the expediente, in the archives of the government, was offered in evidence, *and one question was, whether the copy in the archives of the government was to be regarded as primary or secondary evidence.* Upon this question the court said, 'We are at a loss to know upon what ground such a document can be denied the weight of original evidence.' It was made and signed and authenticated as a record by public officers in the discharge of public duties. The papers were retained in the custody of appropriate public officers for the purpose of proof—and the highest and most authentic proof—of their own action. The documents receive the stamp—and the most satisfactory stamp—of official authenticity.

The signatures are made on it as on papers sent out by the department. We cannot see why such papers should be called copies, or why, in the scale of proofs, they should stand in any subordinate relation to the paper handed to the grantee. If not counterparts or duplicates, it would seem that the original paper is the record retained by the department as a part of its permanent records."

Donner v. *Palmer*, 31 Cal., 510.

Then the record made by the Ayuntamiento at El Paso and the certified copy filed at Santa Fe are sufficient.

"Registered and recorded in some book of record now in the office, is satisfied by copies of deeds on sheets not bound or fastened together in any manner, but folded and filed in the archives."

Mumford v. *Wardnell*, 73 U. S., 422.

Airhart v. *Messieu*, 98 U. S., 491-501.

Our title having been found in the Mexican records, has been reported by the Surveyor General as a "grant" ever since the Gadsen purchase down to the present time. It is a public document, of which the commissioner of the general land office is the legal custodian. It is an archive or an original document of the Ayuntamiento, appertaining to the lands of the Mexican government, and is therefore legal evidence.

Williams v. *Conger*, 125 U. S., 397.

"The party who claims under a title archived in the General Land Office has also this difference in his favor, over one who claims under a copy directed to the interested party, that the officer to whom the copy was directed was the judge of its genuineness, and his action by virtue of such authority is evidence that in his judgment such decree, concession or grant existed; and this would afford strong if not conclusive proof of such fact. So that, upon the whole, it may be said that there is a strong if not conclusive presumption in favor of the existence of the originals and parts of originals of all titles on deposit in the general land office."

Paschel v. *Perez*, 7 Tex., 348.

THIRD POINT.

The Reign of Iturbide was a valid government, recognized by the United States in 1822, and our grant made by virtue of its laws, was not affected, annulled or destroyed by the revolution of 1823, and the overthrow of Iturbide.

The reign of Iturbide was not only a *de facto* but a *de jure* government. February 4, 1821, a treaty was concluded at the City of Cordova, between D. Juan Donohue, Lieutenant-General of the army of Spain, and D. Augustin Iturbide, and the "Plan of Iguala" adopted February 21, 1821.

By the treaty of Cordova the Viceroy, in the name of the king, his master, recognized the independence of Mexico, and gave

up the capitol to the army of insurgents, who took possession of it September 27, 1821. All opposition being ended, a provincial government was established which called a congress for the formation of a constitution. The throne was offered to Iturbide, who referred the offer to the Congress, and this body by a vote of sixty-seven to sixteen, declared him Emperor, under the title of Augustin I. He took the oath and was crowned July 21, 1821. The choice was ratified by the Provinces without opposition, and Iturbide found himself in peaceable possession of the throne.

History for ready reference by Larned, Vol. 13, p. 2,171.

Iturbide was not declared Emperor until the Mexican Crown had been declined by a Royal Prince of Spain.

Niles History of Mexico.

The government of Iturbide was recognized by the United States.

See report of James Smith Wilcox to the Secretary of the United States. State Papers No. 90, 1st Session of 17th Congress, p. 56.

This letter gives the actions and results of Iturbide's war in completing the independence of Mexico. Transmits the treaty concluded at the City of Cordova, and says that Don Juan Manuel de Elizalda is appointed Minister Plenipotentiary.

This is followed by the unanimous report of the committee of foreign relations, to which was referred the President's message concerning the recognition of the late Spanish Provinces in America, resolving that the independence of Mexico had been emphatically declared and practically established, and that she is eminently qualified to maintain the independence she has declared and now actually enjoys.

1st Session of 17th Congress, Vol. II, No. 73, March 19, 1822.
Annals of Congress, No. 39, p. 2,099.
Niles Register, Vol. 22, p. 60–3.

April 6, 1822. Letter of Secretary of State to Minister from Spain, notifying him that the independence of Mexico and other Spanish provinces in America, has been recognized, and that America will entertain reciprocal political and commercial relations with these powers.

Annals of Congress, No. 39, 17 Congress, 1821,1822, p. 2099, 2125.

Don Jose Manuel Zoyaya was presented by the Secretary of State and received by the President of the United States as Envoy Extraordinary and Minister Penipotentiary from Mexico with numerous suites of officers, December 14, 1822.

Niles Register, Vol. 23, p. 209, 240.

The reign of Iturbide and the independence of Mexico having been recognized and acknowledged by the United States, its ambassadors received, reciprocal, political and commercial relations carried on, the judiciary will not now deny that Iturbide's government was legal and valid, or to refuse to recognize laws passed and rights and titles acquired during the Empire of Iturbide, upon the pretext alleged by the defendant, that his government was an usurpation. This was a political question, and the United States having recognized Iturbide's reign, it is not for the judiciary to say that the Mexican Empire was illegal and void, or that the laws passed thereunder conveyed no titles.

Emperor of Austria v. *Day and Kossuth*, 3d DeGex, F. & J. Rep., 217.
Botiller v. *Dominguez*, 130 U. S., 238.
U. S. v. *Maxwell Land Co.*, 122 U. S., 365.
In re Ah Lung, 18 Fed. Rep., 28.
Foster v. *Nelson*, 2 Pet., 314.

The proposition that the acts done and the laws passed during the reign of Iturbide while he was *de jura* or *de facto* Emperor, were valid, and that the succeeding government by suspending, repealing or annulling his acts could not effect vested rights, is fully sustained by authority. The authorities quoted on the points, that a deed once recorded cannot be recalled or annulled, that a grant made under a law, reported before publication of the repealing act, is good and valid, are applicable to this proposition, and in further support thereof, we cite the following decisions:

"Even in cases of conquest it is very unusual for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which if felt and acknowledged by the whole civilized world, would be outraged, if private property should be generally confiscated or private rights annulled on a change in the sovereignty of the country. The people change their allegiance, their relation to their ancient sovereign is dissolved, but their rights of private property remains undisturbed."

U. S. v. *Perchman*, 7 Peters, 51, 86.
Delassus v. *U. S.*, 9 Peters, 118–130.
Strother v. *Lucas*, 12 Peters, 411.
Leitensdorfen v. *Webb*, 20 How., 177.
Langdeau v. *Hanes*, 21 Wallace, 527.

"In the case of conquest, it is undoubtedly in the power of the conqueror to destroy all the rights of the conquered; but in doing so the most flagrant outrage would be done to the moral sense of the age, and such as never would have been presumed to be perpetrated in the absence of the most positive and explicit affirmation of its author. The broad proposition that by a revolution all titles of land previously obtained were annulled and that none of them *proprio vigore* could have a standing in court; that to give them life and energy required the action or sanction of the political authorities of the new

government, and may be admitted to once have had a standing in the jurisprudence, but it has long since become obsolete. The recognition of such a doctrine now would shock the moral sense of the civilization of the nineteenth century. In the early ages when the rights of the common masses were but little considered and cared for, and all power and all rights were permitted to be disposed in an individual personal sovereignty, it is a melancholy fact the doctrine was too well sanctioned by the practice of kings and princes of those times. Then the houses and lands, flocks and herds, husbands and wives and children of a conquered country became the sport of the heartless conqueror. That age has passed away and a milder and more enlightened one has succeeded, in which the conqueror extends the arm of protection to the persons and property of the conquered citizen."

McMullen v. *Hodge*, 5 Texas, 33, 70, 71.

"There is no more firmly settled or universally approved principle of law than that the rights of private property are unaffected by change of government and allegiance affected by revolution."

Kilpatrick v. *Sisneros*, 23 Texas, 113, 132.

McMullen v. *Hodge*, 5 Texas, 34.

In the case of *Terrett* v. *Taylor*, 9 Cranch, 43–49, speaking of the attempt to take away by act of legislature property previously granted to the church, Judge STORY said:

"It was not in the power of the crown to seize or assume it; nor the parliament itself, to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive and unjust, and endured only because it could not be resisted. It was not forfeited, for the churches had committed no offense. The dissolution of the regal government no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the state was held. The state itself succeeded only to the rights of the crown; and we may add with many a flower of prerogative stricken from its hands. It has been asserted as a principal of the common law, that the decision of an empire creates no forfeiture of previously vested rights of property. *Kelly* v. *Harrison*, 2 Johns Ch., 29; *Jackson* v. *Lunn*, 3 Johns Ch., 109; Colvin's Case, 7 Co., 27. Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the state by the revolution, any more than the property of any other corporation created by the royal bounty or established by the legislature. * * * If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of all land titles, and is utterly inconsistent to the rights of citizens to the free enjoyment of their property legally acquired."

Affirmed in *Town of Paulet* v. *Clark*, 9 Ch., 292.

The learned counsel argued in court below:

"Had the Ayuntamiento possessed the power to make the grant, or had it been approved by the Governor of the Province of New Mexico, the Supreme Government of Mexico would have possessed the power to annul the grant, which it exercised by the repeal of the law under which it was made."

That

"a repeal of a law under which it is made, annuls a grant" already made, is too absurd to need any argument. Will therefore ask the court to excuse the citation of a few authorities. If a state, by statute, gives property to an individual and he accepts it, a repeal of the statute would not deprive him of his property. Repeal of a statute or rendering it inoperative for the future, will not destroy an estate, already vested under it.

Den v. *Du Bois*, 16 N. J. L., 285.
Den v. *Fogy*, 2 Penn. R., 826.
Baygents v. *Beard*, 41 Miss., 531.
Dwares on Statutes, 675, 9 Law. Lib.

Some authorities quoted by defendant in court below, sustain that the political power of a government may affirm or disaffirm the acts of a preceding government. These authorities do not mitigate against the positions we argue. They all refer to incipient or imperfect acts of a preceding goverment, rendered under a particular constitution of Texas, and only hold that in case of an inchoate or incipient title, there must be some additional exercise of the granting power before the fee will pass. That is not our case. Here possession was given and the fee passed. Such a title is protected by the law, justice and right of both nations, and it was so provided in section 22 of Act of 1823.

The Constituent Congress of Mexico, April 11, 1823, suspended the law of 1823, but never at any time decided that a grant made under this law was void or of no effect. And the question for this Honorable Court is this: Is our grant made under the law of 1823, before the publication of its repeal or suspension, legal and valid?

Neither a repeal of a law, nor the declaration of the Mexican Congress that the law was illegally passed, could effect a grant made under the law before it was legally revoked. That is the question upon this branch of our case and neither the Constitutional Congress of Mexico, nor the counsels for defendants have denied this proposition. The law was passed under recognized authority. Iturbide was ruler *de jure* or *de facto*, therefore what was done at the time by virture of the laws passed under his reign, have been and must be sustained. "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, when the duties of the officer were exercised.

"Fourthly—*Under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.*"

5 American and Eng. Ency. of Law, 96 and note.
State v. *Carroll*, 38 Conn., 449.
The People v. *Lieb*, 85 Ill., 484; 138 Mass., 214.

The court of private land claims affirmed this same doctrine in the case of *Coe* v. *U. S.*, not published. Judge MURRAY said:

"It is said that Santa Ana was a usurper and that all his decrees were declared void by the Mexican government after he was deposed."

This could not affect the rights of the parties which attached under the laws in force at the date of signing the treaty.

Wheaton's International Laws, Sec. 31.

The constituent congress of Mexico never having decided that our grant was void although it may have subsequently repealed the law under which it was made, the argument and authorities quoted by defendants on page 38 of their brief, in lower court do not effect our case. The Mexican government by no competent authority, binding upon the United States or us, ever made any decision annulling our title. Reversing a case or deciding a law illegal does not make a grant made under the law when in force, void.

If as argued by defendants our title was annulled by the Mexican government, it is for them to show that it was done by *competent legal authority*. In this they have utterly failed. Under the laws of Spain and Mexico not even the king himself could have annulled Heath's title. Property could only be taken by action of the king and Cortes for acknowledged public utility upon a fair compensation.

Constitution, Title 4, C. 1, Art. 172.
Doe v. *Braden*, 16 How., 635–641.

The president cannot seize or embargo the property of any individual unless by virtue of a decree of congress.

Article 21, Sec. 3 of Mexico, Oct. 21, 1824.

Laws have no retroactive effect nor are they abrogated or modified without another posterior, and against their observance shall no disuse, custom or practice to the contrary be alleged.

Hamilton's Mexican Law, p. 1.

In the case of *Doe* v. *Braden*, 16 How., 635, a large tract of land had been granted by the King of Spain to the Duke of Alagon after negotiations had been commenced by Spain to cede Florida which embraced this grant, to the United States. The United States refused to accept the territory offered unless this grant and two others were annulled. Spain by official action of the King

and the Cortes revoked this grant for the reason that Alagon had justly forfeited his rights. That this grant had been forfeited and annulled by Spain was made part of the expressed treaty between the two nations. The question arose in the Supreme Court of the U. S. as to whether or not Alagon's title was lost. The court held that the question whether or not the King of Spain had power to annul the grant was a political question and was decided when the treaty was made and ratified. The decision was placed solely upon the ground that under the constitution the president and the senate had the sole power to make a treaty and the courts of justice had no right to annul or disregard any of its provisions. That as Alagon's grant was made null and void by treaty and the laws of the United States, he could not sustain his action. That it was for the president and the senate to determine whether the King of Spain had power to annul this title, and this they done in the affirmative when the treaty was made, and the courts have no jurisdiction to inquire into the matter. The whole case implies, that had it not been for the treaty and the action of the United States, Alagon's grant would have been sustained. Our case presents no such a record as found in this case. The treaty between Mexico and the United States does not destroy but confirms such titles as ours, and the defendants have not shown that said title was ever annulled or destroyed by either nation.

A repeal of a law can not divest rights obtained under a contract. A sovereign state cannot pronounce its own deed invalid.

Fletcher v. *Peek*, 6 Cranch, 87, 133-4-5-7.
Terrett v. *Taylor*, 9 Cr., 45, 292.
McGee v. *Matters*, 4 Wall., 143.
So. Pacf. R. Co. v. *Orton* 32 Fed., 457–478.
City of Brownville v. *Basse*, 36 Tex., 462.

Legislature cannot repeal a grant, conveying a present interest.

Hoffman v. *City of Quincy* 4 Wall., 535–549.

The law of 1823 is valid and was recognized by the confederate congress of Mexico. April 14, 1823, after the reign of Iturbide was overthrown.

This was a valid law promulgated during the short reign of Iturbide Augustin, emperor of Mexico, and was the first colonization law of Mexico. Very soon after it was passed the emperor was dethroned and the confederate congress of Mexico was organized. This congress, April 14, 1823, ratified Austin's contract made with emperor's government in consideration, it is said in the act of ratification, of its having been made in conformity with the colonization law passed by the junto nachional instituente; thus

recognizing the act of January 4, 1823, and other laws passed by the previous government.

Goode v. *Queen's Heirs*, 3 Tex., 241–250.
Decree confirming concession to Austin., Art, 35.
1 White's Rec., p. 594.
Early laws of Texas, p. 49.

FOURTH POINT.

The grant vested in Heath a title in fee in presenti, which must be protected under the treaty of the United States with Mexico and the laws of nations, unless it is shown that the land granted him has been lost or forfeited by some formal and regular proceedings of denouncement according to the laws of Mexico.

All admission found in the papers relative to possession and the character of our grant, and in truth all statement of facts in Heath's petition and the town council's decree, are to be taken as true. What is stated in either paper as to facts and intent must be admitted.

Glenn v. *U. S.*, 54 U. S., 250, 255–6.
U. S. v. *Reading*, 18 How., 1.
U. S. v. *Boisdore*, 11 How., 62–87
Hornsby v. *U. S.*, 77 U. S., 238.
Fremont v. *U. S.*, 17 How., 562.

In Reading's case, 18 How., 8–9, it was alleged in the grant that he was an American and had become a Mexican citizen. Held that the fact must be taken as true. Certain facts are established by Heath's petition and the decree thereon. Among these as well as others it is important to remember.

1st. Th at Heath was a Catholic is proved by the record. In his petition he says:

"The welfare of the soul being to me what I prize above all things, and as I unite myself with my brethren, the faithful people of this empire," he therefore asks this grant. The law under which we took the grant declared "the Roman Catholic Apostolic religion the established religion of the empire."

Heath's colony was to be composed of Roman Catholics.

2nd. That the transmission of the notice of the passage of the law of January 4, 1823, by the organic national junta, took sixty days to reach El Paso for publication, as appears in the recital in the grant. (See page 168 of record.)

3rd. That Juan Gid was Dr. John G. Heath is proved by map and certificate of surveyor W. Box, which was made part of the grant.

4th. That the chief executive had knowledge of Heath's pe-

tition which was sent to the executive prior to the enactment of the colonization laws, and that subsequently the Ayuntamiento was directed to carry out this law by making the grant to Heath itself. December, 1822, Dr. Heath applied to the executive for this same land under the laws then in existence. The petition was sent to the executive of the nation and is on file to-day in the City of Mexico, copy of which is in this record page. No answer was made to his petition until after the passage of the law of 1823. The governor of the province with instructions of the executive published the law of January 4, 1823, directing Heath to present his petition to the town council of El Paso; therefore, April 3, 1823, Dr. Heath petitioned the ayuntamiento of El Paso for the land now claimed. The same day the council allowed the petition, gave notice, and appointed officers to make a survey and put Dr. Heath into possession. Different steps were taken on different days, and the grant finally completed April 25, 1823. The survey was made with a great deal of care, a map of the land made and annexed to the papers for clearness and exactness in all time. The words of the conveyance are clear and distinct, sufficient to make a grant *in presenti* and not a contract for conveyance. The following are a few of its phrases:

BRACITO, April 17, 1823. The commissioners appointed by the decree of the honorable ayuntamiento, consisting of five individuals, for the purpose of executing the papers in the case, having accepted the charge, we proceed to this place where, in accordance with instructions, taking the head of the Bracito acequia for the central point of the estate into possession of which Juan Gid is to be placed, he, in sign of possession, with an axe cut the bark from two cottonwood trees, and when the wood of the trees was exposed wrote therein:

"Haza de Dr. Juan Gid" and the present year, on both of the trees.

Heath's petition asked that "a grant be made to him."

"Was to be placed in possession of the Bracito tract and given *absolute title thereto.*"

"Which tract was granted by this ayuntamiento to Juan Gid for settlement according as herein set forth."

"That Juan Gid holding the proprietorship of the lands of the hacienda, any of the inhabitants of this district desiring to remove to the Bracito for the purpose of settling at this place must arrange with him."

"That the land granted him outside of the said river prairie is deemed sufficient, etc."

The survey having been completed,

"whereupon the party interested, Juan Gid, was asked whether he was satisfied *with the whole survey made of the land* INTO FULL POSSESSION OF WHICH HE WAS TO ENTER, and he replied that as he had witnessed the formality that was observed throughout the execution of the survey of his land, he was in all respects satisfied. With which understanding and there not having appeared any claims to suspend the carrying out of the proceedings, *this commission placed the said Juan Gid in lawful possession of said land.*"

"It being considered by this ayuntamiento that this case is concluded in which the land tract of the Bracito was granted for settlement to Juan Gid, an Anglo-American of the United States, therefore the fee on same will now be assessed."

When the grant was finished,

"the original was filed for perpetual evidence, and certified copy sent to his excellency, the governor of the province, and a like copy to the party interested, for his security."

We are clearly of the opinion that these words convey the title in fee; they are sufficient for this purpose as the granting clause in an ordinary deed. Legal title passed when the identification of the granted land became complete by putting the grantee into possession of the same.

Deseret Salt Co. v. *Tarpey*, 142 U. S., 241.
U. S. v. *So. Pacif. R. Co.*, 146 U. S., 570–593.
Borden v. *N. Pac. R. R. Co.*, 145 U. S., 535.
Schulenberg v. *Harriman*, 21 Wall., 44–60.
Right v. *Rosenberry*, 121 U. S., 488–496.
Southern Pac. R. R. Co. v. *Orton*, 32 Fed., 459.
Tubbs v. *Williout*, 73 Cal., 61.

The fee was vested on the day the grant was made, April 17, 1823. Art. 22, of the law of January 4, 1823, provides:

"The date of the concession of lands constitutes an inviolable law for the right of property and legal ownership. Should any one, through error or by subsequent concession, occupy land belonging to another, he shall have no right to it."

Hall's Mexican Law, p. 106, Sec. 277.

This grant has all the elements of a complete and perfect title. It was not a float, to be located within a large body, but a certain designated, fixed and marked tract of land, as we have shown. It was not a mere *executory* contract, or a contract to grant, but it was an absolute grant *in presenti;* grants of this character have always been protected by the courts of the United States under the treaties with Mexico and other nations.

Most of the land, we claim, was embraced in the treaty of Gaudalupe Hidalgo, February 2, 1848, the remainder came into the United States under the Gadsden purchase December 30, 1853. The Gadsden purchase adopted the provisions of Gaudalupe merely as to the protection of property.

Provisions of the treaties are familiar. See Treaties and Conventions of the United States with other Nations, p. 685.

The second section of the protocol, page 693, says:

"The American government, by suppressing the 10th article of the treaty of Guadalupe, did not in any way intend to annul the grants of land made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunal."

While the last paragraph of this second article declares that

"Those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th day of May, 1846, were within the protection of the treaty."

Tex. Mex. R. R. Co. v. *Locke*, 12 S. W. R., 80.

Art. 5 of the treaty of 1853, page 696, adopts all the provisions of Art. 9, 16, 17 of the treaty of Guadalupe Hidalgo.

Art. 6. "No grants of land bearing date subsequent to treaty will be considered valid, or be recognized by the U. S., nor will any grants made previously be respected, or be considered obligatory, *which have not been located and duly recorded in the archives of Mexico.*"

This is clearly a treaty providing negatively that titles to land surveyed and recorded must be protected. Our grant was surveyed and recorded both in old and New Mexico in the year 1823 and remains on file in the land office at Santa Fe, New Mexico, at the present time, being among the papers found in the archives of Old Mexico.

U. S. v. *Clarke*, 8 Peters, 436–462–3.

Under the treaties and constitutional provisions the courts of the United States have always been liberal in construing contracts and protecting grants made under Mexican and Spanish laws. The cases are numerous from the earliest history of our country down to the present time which hold that all legal or equitable choate or inchoate titles derived from Spain or Mexico previous to their concession to the United States must be protected; and our courts have not only given a liberal construction to all such contracts, deeds and concessions, but have also been liberal in the presumption that a grant when once made is legal and that the officers in making it had authority to do so. Knowing that these cases are familiar, and that this honorable court has frequently affirmed the doctrine, we ask to be excused for the liberty of quoting a few of the many cases that are especially applicable to the points involved in this part of the controversy.

"The United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Gaudalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow or illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulation of the treaty, the laws of nations, the laws, usages and customs of the former government, the principles of equity, and the decisions of the Supreme court, so far as they are applicable. *They have not desired their tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just*

rights which could have been claimed from the government which they supersede."

U. S. v. *Auguisola*, 1 Wall., 352–8.

In *Hornsby* v. *U. S.*, 10 Wall., 237, it is said that it could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were entrusted with their execution.

In the case of *U. S.* v. *Moreno*, 68 U. S., 1 Wall., 404, speaking of the established laws for transfer of public lands in California, the court said:

"When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all land titles in California existing at the time of the concession of that country to the United States by the treaty of Gaudalupe Hidalgo. That cession did not impair the rights of private property; they were consecrated by the laws of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The act of March 3, 1851, was passed to assure to the inhabitants of the ceded territory the benefits of the right of property they secured to them. It recognizes alike legal and equitable rights, and *should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court in the cases which may come before it to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice.*"

In tracing the history of these grants, and the decisions of the courts made under them, the fact of a survey being made and possession being given, is always a strong, if not the chief, element in sustaining the claim. We have not found a single decision reported in the books, where, in any case, there was a complete judicial possession given, that the grant given by the Spanish and Mexican authorities has not been sustained. Our courts have invariably held that delivery of judicial possession was equivalent to livery of seisin, at common law, separating the land granted, from the public domain, and absolutely vesting the title in the grantee.

In support of this proposition we will quote a few of the many cases on the subject. The survey and possession of the land in our grant was as complete and perfect as that required in the following decisions:

In Fremont's case, 17 Howard, 554, the court says:

"But until the survey was made, no interest, legal or equitable, passed in the land. The original concession granted on his petition was the naked authority or permission, and nothing more. But when he had incurred the

expense and trouble of the survey, under assurance contained in the concession, he had a just and equitable claim to the land thus marked out."

In the case of *VanReynegan* v. *Bolton*, 5 Otto, 33, the court held that:

"Under the Mexican law when a grant of land is made by the government a formal delivery of possession to the grantor by a magistrate of the vicinage is essential to the complete investure of the title. This proceeding, called in the language of the country, 'the delivery of judicial possession,' involves the establishment of the boundaries of the land granted where there is any uncertainty with respect to them. A record of the proceedings is preserved by the magistrate, and a copy delivered to the grantee, and such lands are excluded from settlement under the pre-emption laws, so long as the claims of the grantees remain undetermined by the tribunals and officers of the United States."

To the same point are the cases of

Graham v. *U. S.*, 4 Wallace, 261.
Malarin v. *U. S.*, 1 Wall., 289.
U. S. v. *Pico*, 5 Wallace, 289.
More v. *Stienback*, 127 U. S., 70–9.
U. S. v. *Morant*, 123 U. S., 225–236-241.
McMickin v. *U. S.*, 97 U. S., 204–215.

Again in the very recent case of the *Inter-State Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S., 569, the court said:

"It is contended that the case of *U. S.* v. *Arredondo*, 6 Peters, 691, govern this case in favor of the appellant. In that case, however, the grant to Arredondo was a specific tract of four square leagues, with the condition that he should establish a colony thereon. This condition was held a condition subsequent, and the title absolute. Survey was made and possession given. Neither does the case of *Gonzales* v. *Ross*, 120 U. S., 605, control this case; they are entirely dissimilar. In that case the grant was made under and by virtue of the laws of Coahuila and Texas, passed in 1832, and a commissioner appointed under that law put the grantee in possession of the tract, at the same time giving him the usual testimonial or deed. This court held that the grant was absolute in form and sufficient to pass the title."

Miller v. *Dale*, 92 U. S., 473.
U. S. v. *McLaughlin*, 137 U. S., 428.

All claims where efforts have been made to establish Mexican grants and failed have been defeated for the reason:

There was no survey and possession given, or there was no authority to make the grant, or the grant was a fraud, or that the grant had not been recorded in any of the public archives of Mexico, or there was no grant given, only a concession with certain conditions precedent, which never having been performed prevented the title from vesting. Our grant meets all these requirements and presents a claim which, under the laws of Maxico,

the treaty of concession, the decision of courts, and the statutes of congress should be confirmed. It is clearly distinguished from the class of cases which fail for some of the reasons just enumerated.

FIFTH POINT.

No denouncement or forfeiture.

Heath's title was not forfeited for the reasons:

FIRST. *The law of 1823 was repealed before the limit of two years for cultivation had expired, therefore his grant was relieved from any condition or penalty, as it is well settled that no fine, penalty or forfeiture can be enforced after the repeal of the law imposing the same.*

SECOND. *The revolutionary government having interfered with and prevented the performance of the conditions subsequent, the grant was thereby relieved of those conditions and became absolute.*

THIRD. *The law of 1823, having provided that the property of all foreigners who were Catholics should be protected, and Heath being a Catholic, there can be no disinheritance of his heirs by reason of he having died in the United States in 1851 after most of the lands came under the jurisdiction of the United States.*

FOURTH. *All of our grant lying north and north-east of the Rio Grande river, being a greater part thereof, came into the United States by the treaty of Guadalupe Hidalgo, and as Heath died after this treaty, the question that "Heath's heirs domiciliated in the United States could take no title to real estate in Mexico," which was so earnestly argued by the learned counsel in court below, does not arise, as this land at the time of his death was mostly within the territory of the United States.*

FIFTH. *The authorities of Mexico having interfered with Heath's possession and the performance of the conditions subsequent, by unlawfully forcing his abandonment under the threat of imprisonment or death, are estopped from claiming either forfeiture or abandonment on these grounds.*

SIXTH. *Under the laws, statutes, ordinances and decisions of Mexico, Heath's title could not be forfeited without some formal and regular proceedings of denouncement, and there never having been any such proceedings had prior to the treaty with the United States, no forfeiture can now be declared, and our title should be confirmed. Regrants do not preclude the judicial niquiry into claimant's rights against forfeiture.*

These propositions will be argued together.

If the suspension of the law of 1823 by the National Congress, April 11, 1823, was not after its publication, a repeal of the act of 1823, it can not be doubted but that the colonization law of Mexico, August 18, 1824, did repeal the colonization laws of 1823.

All decrees, regulations and Spanish laws prior to 1820, are held inoperative upon Mexican grants. See page 63, of this argument.

A new act in form of amendment or otherwise, covering the same subject-matter of the former, inconsistent with it, and intended to supersede and take the place of it, repeals the old law by implication. If it add offense and prescribe different penalties, then there is a repeal.

Norris v. *Crocker*, 13 How., 429, 455, 607.
U. S. v. *Claflin*, 97 U. S., 546.
W. U. Tel. Co. v. *Brown*, 8 N. E. R., 171.

Repeal of a statute imposing a forfeiture or fine operates to absolutely extinguish all penalties under such law, and after repeal no forfeiture can be enforced. The law must be considered as if it had never existed except as to transactions passed and closed.

Norris v. *Crocker*, 54 U. S., 429–436–7.
Yeaton v. *The U. S.*, 5 Cranch, 281; 6 Ch., 329.
State of Md. v. *B. & O. R. R. Co.*, 3 How., 534.
U. S. v. *Tyner*, 78 U. S., 88, 95.
Thompson v. *Bassett*, 5 Ind., 535.
23 Am. & Eng. Ency. L., 500.
Sedgwick's Stat. & Const. Law. p. 109.
Dwarris Stat. & Con., 160–676.
1 Kent Comm., 465.

This principle is absolute and universal, except where it has been abrogated by statute or constitution, providing that repeal shall not have effect to release or extinguish any penalty, forfeiture, etc., incurred under such statute.

National Bank v. *Lemke*, 54 N. W. R., 919.
Com. v. *Sherman*, 85 Ky., 686; 4 S. W. R., 790; 32 Fed., 722.

We do not argue that the act of 1823 is strictly a penal statute, but do say without fear of contradiction that the forfeiture clause of said act is *quasi penal*; that section 23 which provides for renouncement and resale after two years for failure to cultivate said land is a *forfeiture*, and must be ruled by the same general principle of law we have announced, which govern all other cases of fines, forfeitures and penalties. This forfeiture of our land was in the nature of a penalty, which was taken away by repeal of the act.

Ewell v. *Daggs*, 108 U. S., 143–151.

When a law is repealed it must be considered, except as to transactions passed and closed, as if it had never existed. Upon this principle the repeal of a statute puts an end to all criminal prosecutions and civil proceedings under the statute repealed. There can be no legal conviction in the criminal courts, nor any judgment imposing fines or forfeitures in the civil courts, after the law imposing the same has been repealed. In such case the courts have no jurisdiction. The statute becomes as if it never had been passed. The repeal obliterates the forfeitures and penalties of the statute, as if they never existed.

Hirschburg v. *The People*, 6 Colo., 145–6–7; 78 U. S., 95; 3 Howard, 534.
Van Inwagen v. *City of Chicago*, 61 Ill., 31–4.
Rood v. *The Chi., M. & St. Paul R. R. Co.*, 43 Wis., 146–153.
Butler v. *Palmer*, 1 Hill., 324.

It has been the universal rule to apply this principle of law to forfeitures imposed by statutes in matters of contract previously made in cases of forfeiture for breach of conditions subsequent. And such laws have been upheld as against all objections, on the ground that they deprived parties of vested rights or impaired the obligations of contracts, except in cases involving rights and interest which have accrued under it, and all matters and transactions passed and closed. Holding there could be no vested right in a fine, forfeiture or penalty until a final judgment imposing the same was entered under a law then existing.

Ewell v. *Daggs*, 108 U. S., 143–9, 150–1.
34 N. J. L. 193.
Thompson v. *Bassett*, 5 Ind., 536.
23 Am. & Eng. Ency. L., p. 500.

All these decisions and the principles of law decided by them are very applicable to our case. The grant was made and absolute posssession given, with no conditions except the proviso that in the event he did not, within two years from the date of concession, cultivate the land, "the right of property shall be considered as renounced, *in which case*, the respective ayuntamiento can grant it to another." Now it is evident from this, the cause of forfeiture would have to be found by the ayuntamiento before it could regrant our land to another. In this the ayuntamiento would act judicially. In all cases, when a debt, or penalty, or forfeiture is set up, the determination of the liability becomes a judicial question.

Ames v. *Port Huron Log Co.*, 11 Mich., 147.
Cooley's Constitutional Limitations, Sect. 363.

If, as held in the cases above, courts do not have jurisdiction to impose a fine or forfeiture when the law inflicting the same had been repealed, how can it be that either the ayuntamiento or any

other Mexican authority had any right to forfeit our grant, the act of 1823 having been repealed before the forfeiture occurred? The power to forfeit and sell was not to be exercised at the discretion of the ayuntamiento but upon an exigency, a failure on our part to cultivate the land granted, as it was only, "*in which case*," that any forfeiture occurred. A neglect to cultivate and the existence of the law declaring our failure a forfeiture, were pre-requisite and indispensable to the very existence of the power to forfeit, therefore, the law authorizing the forfeiture being repealed before it occurred, the power to forfeit never came into existence. This point is directly settled by authority. Proceedings for the sale of real estate of an intestate for the payment of debts were commenced before the repeal of the act of legislature of Ohio, the administrator notwithstanding the repeal went on to sell the land: Held that the sale was void, the power of the administrator to sell terminated with the repeal of the law. That it was not an independent power, to be exercised at discretion, when the exigency in his opinion may require it, but was conferred by the court, in a state of things prescribed by the law; the order of the court is a pre-requisite, indispensable to the very existence of the power; and if the law which authorizes the court to make the order be repealed, the power to sell can never come into existence.

Bank of Hamilton v. *Dudley*, 2 Peters, 492.

To the same effect:

Hartung v. *The People*, 22 N. Y., 95–100.

Van Inwagen v. *City of Chicago*, 61 Ill., 31.

Miller's Case, 1 Wm. Blackstone, 451.

The defendants may say, if, by virtue of the repeal of the law of 1823, the forfeiture could not be enforced, the grant also failed. But this is not correct; the authorities quoted hold that such repeal did not effect matters and transactions passed and closed, and therefore our title being a vested right remained.

A statute authorizing the laying of a tax was repealed after an assessment of such tax, and also imposed a penalty of twelve per cent. on failure to pay the tax assessed; held—that the tax could be collected, but the penalty could not, after the repeal of the statute. The rule being that the assessment of the tax was a thing passed and completed, and could not be affected by the repeal; contra with respect to the penal percentage.

The Town of Belvidere v. *The Warren R. R. Co.*, 34 N. J. L., 193.

The propositions we argue have been very forcibly and ably held by Chief Justice HORNBLOWER, of New Jersey. His language is very applicable to our case:

"1—Where one statute is repealed by another, *acts done*, in the meantime, while it was in force, shall endure, stand, and be good and effectual.

2—When an act of Parliament is repealed it must be considered, *except as to transactions passed and closed*, as if it had never existed.

3—The effect of repealing a statute varies according to its nature and object, and the circumstances of the case.

1—As if it be in the nature of a contract, or a grant of power, a repeal will not divest interest acquired or annul acts done under it.

2—If the legislature *ex mero motu* by statute gives to an individual property belonging to the state, and he accept it, a repeal of the statute would not deprive him of his property.

3—*For acts done or omitted under an existing law, subject to punishment or prejudice: if that law be repealed, the offender will escape the penalty.*

4—*When a statute restraining a man's natural rights or his use of his property is repealed he is restored to those rights.*"

James v. *DuBois*, 16 N. J. L., 285.

INTERFERENCE BY GRANTOR.

It is an acknowledged rule of law that if a grant is on a condition subsequent which is illegal, or its performance becomes impossible by the act of God, the public enemy or the grantor, then the grant is divested of said condition. If by reason of a change of government or officers or by reason of the subsequent hostility of the inhabitants of the province or by reason of anything done by the government, itself the grantor, the settlement of Heath's colony and the cultivation of the soil were prevented, hindered or rendered impossible and unsafe, then the estate, having previously been vested in Heath by survey and possession, was not divested by the failure of the performance of such conditions, but became absolute.

See authorities hereafter.

The action of the departmental assembly, see page 62, in trying to avoid Heath's title and directing the ayuntamiento to notify him not to come to Mexico, that the land it had granted him belonged to the jurisdiction of El Paso, and the law under which the grant was made being repealed, did prevent, hinder and excuse Heath from performing the conditions subsequent.

That this action of the assembly, together with the evidence produced, shows that Heath was hindered, interfered with and prevented from settling upon and cultivating this land, and that he took his property to Mexico and offered to perform in full his part of the contract, and was prevented from doing so by the grantor and finally driven out of the country under penalty of imprisonment or death.

The truth is, this grant was made under the laws of Iturbide, and after he was dethroned Heath's possession and rights were interfered with, under general policy of resentment against all the emperor had done—a resentment like most popular fury which was soon to give way to a gratitude which made the day of his death a public fete day for all time, the question is, Could these fickle and infuriated people destroy our title by killing the emperor?

We have shown that neither the action of the departmental assembly, nor any subsequent action of the government itself or its officers, could destroy the title that had vested. Trying to prevent us from occupying our grant according to its conditions, gave us this land unincumbered with conditions. That it did not operate to destroy, but to give additional life to our grant. No doubt the learned counsel for defendants may say, this proposition is inconsistent with what we have heretofore said: that we have argued that the action of the assembly did not destroy our title or affect our rights, and was therefore a nullity. But this does not necessarily follow.

The action of the assembly was a nullity in so far as attempting to revoke our title, because it had no jurisdiction in the premises for this purpose, yet it had the power and authority to release the conditions, and when they wrongfully prevented and hindered Heath and his followers, from settling upon the land in dispute for the reason to this extent they had jurisdiction. This land was within their province and territory, and they were in duty bound to give protection to all the citizens and their property.

The departmental governor and assembly were required to see that this law was enforced, and that all the contracts made under it were carried out; instead of doing so they sought to annul Heath's contract and otherwise interfere with him in occupying the land.

Again, it must be remembered that after our grant was made and before we went to locate and cultivate the land, and within the two years of grace we had, the system of donation of public lands in Mexico was by the act of 1824 changed by the general government giving power and control over the lands to the states; therefore the action of the departmental assembly in hindering and preventing us from cultivating our lands became the act of the grantor, but being illegal, they having no authority to undo what had been done, the land having been vested in Heath by grant and possession, their actions only gave him title absolute, relieved of conditions subsequent. That Heath paid the fees assessed for the land and was to considerable expense is proved by the record, page 167, also that under and in furtherance of said contract Heath, on June 17, 1823, had gone to the United States to procure his families, stores, etc., as is shown by the action of the assembly, for the ayuntamiento of El Paso was to notify him through the representative of the United States not to bring his colony to Mexico. There is no offer to pay back what Heath had paid or to indemnify him for the loss incurred. Could the Mexican government keep his money and the land both, and Heath not have a legal remedy to enforce his contract? That Heath did not get the notice of the action of the assembly until he arrived at El Paso we think is possible? He went there ready, willing, able and prepared to fulfill every part of his contract, and he spent in so doing some eighty thousand dollars as shown by the oral evidence. That he spent some time

in trying to occupy this land, that the authorities of the government in power then, after the revolution and death of Iturbide, would not permit him to remain and finally drove him off under threat of imprisonment and death, and that he came back to the United States a bankrupt. The evidence shows that the action of the departmental assembly June 17th 1823, was sent to the ayuntamiento at El Paso and is on record there, and it was no doubt by reason of this communication that Heath was not permitted to occupy this grant. Just what these fees were that Heath paid we have not been able to exactly ascertain from any information accessible to us. But from one grant we saw (cannot now call its name) made by the town council of El Paso about 1823, judging from the fees therein mentioned, at the same rate the fee in his grant would have been about $2,000. Whatever the fee was, it was not paid back. If so this record would have shown it. If there had been any mutual settlement, release or abandonment of this grant by Heath, these fees would have been paid back and release given of record.

SYNOPSIS OF EVIDENCE.

Our evidence taken on depositions upon orders of court corroborates the records and proves beyond all per-adventure of doubt:

FIRST. That immediately after this grant was made and Heath put into possession, he came to America, sold all his property, prepared his stores, provisions, goods, implements, people, etc., returned to Mexico, ready, willing and able to perform his part of the contract, taking possession of his land in 1824, with intent to improve and cultivate the same. (See depositions from pages 73 to 143 of the record.)

SECOND. That when Heath and parties with him arrived in Mexico, Iturbide's government was overthrown, the revolutionary parties then in power would not permit him to remain on his grant, and drove him off and out of the country, under the threat of imprisonment or death, upon the pretext that his grant had been made under the reign of Iturbide and that the law had been repealed.

Properly certified copies of deeds, show that on the 17th day of April, 1824, John G. Heath sold all his land in various counties of Missouri, being some six thousand acres, and also his slaves, preparatory to his departure to Mexico. This is doubly important for consideration, first: to show ability, and second, intention to do what he had promised. He then completed his preparations and started for Mexico, with the intent to remain and settle there, and cultivate and improve the land granted by the Mexican government in 1823.

Major Horatio H. Hughes, of Howard County, Mo.(page 114 of record), testifies:

"That he was well acquainted with Heath, that he knew of Heath's going to Mexico in 1821 or 1822, that he returned in 1823 or 1824 for the purpose of getting up a company to go with him to Mexico to settle upon and cultivate a tract of land near El Paso that had been granted him by the Mexican government. That Heath raised a company of one hundred and fifty or more men, women and children, and leaving old Franklin, Mo., started for Mexico going down the Missouri river to St. Louis and New Orleans. That they had with them a printing press, stores of all kinds, medicines, farm implements, machinery for the making of clothing and other machinery suitable to that age. That the affiant sold them a load of flour, loading the same onto their boats, and at the time and when they were leaving, Heath and others told him that they were going to Mexico to remain, become citizens, settle upon and cultivate land on the Rio Grande river near El Paso that had been granted to Dr. John G. Heath. That Arthur Sherman, ———Stewart and Moses Heath, his brother, went with Dr. Heath to Mexico, and in a year or so most of the party returned, and that when they returned, Dr. Heath and others said "when they got to Mexico there had been trouble, Iturbide's government under which the grant had been made, was overthrown. and that the revolutionary government would not let them remain on the land and settle there, drove them off under penalty of imprisonment or death, that the government as then organized tried to undo all that had been done under Iturbide's reign, and for the reason that his laws had been repealed, they would not allow Heath and his party to remain. That they had done all in their power to fulfill Heath's contract, but were not permitted to stay and returned to America bankrupt. That Heath's preparations and expenses must have cost him over sixty or seventy thousand dollars. That in 1847 as Captain in Colonel Donaphan's regiment the affiant fought a battle on the Bracito and knew at the time it was Heath's land, and when he returned to America often talked with Heath about the matter. Heath always claiming that the Bracito belonged to him, that the Mexican authorities had wrongfully drove him off of it, and that he hoped some day to get his land back."

Charles E. Woodroof (page 123) testifies:

"That he knew Dr. Heath and his family after 1836 or 1837. That Heath often told him about the tract of land called the Bracito on the Rio Grande river not far from El Paso, granted to him by the Mexican government through the Town Council of El Paso del Norte in 1823, that he had taken a company, provisions and stores there to settle in 1824, on the same and cultivate it, that when he got there, there had been a revolution and the authorities would not let them occupy the land, that they drove them off and would not let them remain, claiming that as the grant had been made under Iturbide's time, they could not remain. That Eliza Joseph and Robert J. Heath, children of the said Dr. Heath had often told him the same thing. That Dr. Heath and family could all talk Spanish, which they said they learned while in Mexico. That affiant was on the Bracito in 1846 or 1847, in Company "C" Missouri Infantry, commanded by Col. Easton and in Gen. Price's Brigade, and fought a battle or skirmish with the Indians there. From what Heath had told him affiant knew they

they were on his land, and so said to those with him. After returning from Mexico he frequently talked to Heath about the incident. That Heath tried to sell him his grant and they made some negotiations about it, but never entered into any written contract. He further said that after having seen the land, that if he at the time had the money he would have purchased. That Heath's heirs often talked with him and tried to arrange with him to go down and take possession of this land, but they did not, on account of the want of means and the hostility of the Indians at this time. Dr. Heath and heirs always claimed this land, and expressed the hope and belief that they would get it all right some day, as they said they had never abandoned it, but were driven off, had left from necessity under the threat of imprisonment or death, after they had tried faithfully to make it their home. That Dr. Heath was a shrewd, intelligent man, a leader of men all his life, was known both as a lawyer and doctor, and was said to be very wealthy before going to Mexico."

James Bryan, Esq.:

"Swears (page 119) that he is eighty-eight years old; that he knew Dr. John G. Heath from 1821 or 1822, to the time of his death; that in 1821–2–3–4, Heath was a very wealthy man, was always prominent and influential, was a member of the Constitutional convention in Missouri in 1820. That in 1824 Heath organized a company at Old Franklin to go with him to Mexico; that they came down the river in six or eight boats, about one hundred and fifty miles, stopping at the mouth of the Semosage Creek for a day or so; that Heath and his family, wife and four children, came out and stayed all night with affiant's father. That Heath bought three or four loads of flour and bacon which affiant helped to load onto their boats. There were over one hundred and fifty with him, men, women and children. While there a number of neighbors and friends joined Heath, and went with his company to Mexico, Jacob Dust, Charles McLain, Abraham Dust, with a family of ten or twelve, six or eight boys, and Abraham Zumalt and a large family. Zumalt and Abraham Dust did not return but stayed in Texas. Jacob Dust came back and stayed a while, then he and his family went to Texas, and he was the Lieutenant Dust who was killed in one of the massacres in Texas. Heath took with him to Mexico his wife and four children, two boys and two girls. The oldest was a boy named Robert. I saw them all at the boats in the river, and there were over thirty different families. Heath and the parties with him said at the time they were going to Mexico to settle, live on and cultivate his tract of land there. That I remember these facts and the time they occurred, for the reason that I got from Charles McLain when he went away, a fine, dark bay, blooded stallion. That I was then not of age, and my father helped me to get him, and McLain returned about two years afterwards and got the horse back again. That Heath and the others also returned and when they returned said, they were driven off the land and out of the country by the Mexicans, and were not allowed to remain there on account of a trouble or revolution in the Mexican government, the emperor having been killed. That before Heath left for Mexico he had a great deal of property which he sold—a number of farms in St. Charles county and town property in St. Charles, houses and lots, had several Spanish grants, valuable farm land near Herman, Missouri, salt wells, and a valuable tract of bottom land, 1,700 acres at the mouth of the Vous river. That he knew of Heath's lands from the fact of

being at the time a surveyor, and hearing his father and Heath talking about trades. That affiant was assistant and deputy surveyor in St. Charles county for over thirty years, and county surveyor in Vernon county, Missouri, for over fifteen years."

Mr. Bryan testified to many other important facts, especially in his cross-examination, to which the court's attention is directed.

Magdalena de Carranco (page 126) testified:

"That she lives in Victoria, Mexico, that she is over eighty-five years old, that in 1824 she lived at Soto la Marena, a port on the Gulf of Mexico. That she knew Juan Gid, or Dr. John G. Heath and family. That he came there in 1825 with many people, on their return from Mexico to the United States, that they had been up north at El Paso del Norte to settle on land there as they said, but had to leave and were on their way back to America. They stayed there quite a while, some of them working in the Salt Springs. That Heath was a man of sandy complexion, that he had his family with him, his wife and a number of children, boys and girls, and a great number of other families. That she worked for them and became quite well acquainted with Mrs. Heath. That this occurred about the time of the death of Iturbide. I remember this well, he being shot not far from there. The going back of Heath to America was in some way connected with the overthrow of Iturbide's government. Heath and company may have also been in Soto la Marena in 1824 and I not remember it, as it was only in 1825 on their return that I became acquainted with them."

Price Cooper (page 129) swears:

"That he is eighty-two years old, lives at Ysleta, Texas, that he knew Dr. Heath in 1822-23-24, met him during that period at El Paso del Norte and also on the land we claim. That he knew that in 1823 a tract of land called the Bracito on the Rio Grande River some forty miles northwest of El Paso del Norte, was granted by the Mexican government through the Town Council of El Paso to the said Dr. Heath or Juan Gid. That Heath was put into possession of the land in 1823, then went back to the United States to get persons to settle with him on said land. That he returned in 1824 with his wife, family and two hundred persons with him. They remained a short time on the land and after the death of Iturbide, they were driven off and returned to the United States. That he met Heath and others on this land in 1824. That Heath had brought with him many things, stores, provisions, machinery of all kinds, farm implements, plows, printing press, etc. That Heath was a man of light or sandy complexion, a little taller than ordinary size, was known as a lawyer and doctor, had with him his wife and four children, boys and girls, a boy ten or eleven years being the oldest. A man by the name of McLain and a brother of Heath's were in the party. Heath was forced to leave his land in 1824 or 1825; he was given a certain number of days to go away under the threat of imprisonment or death. These facts I got at the time from Heath, the Town Council and other officers of the government and the reasons given were that Iturbide and his government had been overthrown and that nothing done during that time should remain, that the law under which

Heath's grant had been made was repealed and for this reason they could not remain. That they returned to the United States by the way of Chihuahua and Soto la Marena, the way they came to El Paso del Norte. That when they were driven out of the country Heath left many things behind him, not having money enough left to take all back and at the time he said 'it had cost him many thousand dollars to get there and it would ruin and bankrupt him to go back. Many things that Heath had were taken from him by the Mexican Government and people and the affiant afterwards saw some of Heath's machinery at Chihuahua. The affiant further says that the Bracito was always known to every one in that vicinity as belonging to Juan Gid or Mr. John G. Heath from 1823 down to the change of government."

Don Geogonia Herera (page 132) testifies:

"That he is over eighty-one years, was born in El Paso del Norte, Mexico, now Juarez, where he lives at present. That he knows Juan Gid or Mr. John G. Heath in 1822-3-4, saw him in El Paso often and met him in 1824 on the Bracito, a tract of land granted to Heath by the Mexican government through the ayuntamiento of El Paso in 1823, that he went there at the time with his father, his uncle and several brothers and that a dog came out from the house and frightened the mule his uncle was on and he was thrown off the mule. That Heath and those with him did not stay very long on this land. After it was known in this country that Iturbide was overthrown, Heath was not allowed to stay on his land and was driven off by the authorities of the successful party of the government, who tried to undo everything that had been done under Iturbide's reign, and as Heath got his land under Iturbide's laws he was not allowed to remain but was driven off under the threat of imprisonment or death. When Gid, or Heath left here he went south of Chihuahua and Soto la Marena, said at the time as Iturbide was overthrown he could not remain, they would not let him. The particulars I cannot give further than I have stated, but I do know that Gid left and did not return to his land on account of the overthrow of Iturbide's government. Had no knowledge of the government by any official act of the executive ever annulling Heath's title, they only claimed as it was made under Iturbide's laws, Heath should not stay. In speaking of this grant from what he knew personally and heard from Ponze de Leon and others, the affiant said: "I knew that it was the general reputation that the grant was made in Heath's favor. I once saw Gid or Heath on this land as I have stated and I know it was the general reputation in all this country or neighborhood of the land from 1823 down to the change of government, that the said Juan Gid was owner of the same. It was always known by everyone as Heath's and it was well known that Heath's family and others with him were living on the land in 1824."

We have not been able to find anyone in Heath's company who is now living. After a period of seventy years, it was difficult to find the number of witnesses we did who had personal knowledge of any of the facts pertaining to our case occurring at that period, Robert J. Heath was the last of the Heath family to die. In May, 1882, he executed an affidavit before W. T. Ford, clerk of the Court of Parish of Gadd, State of Louisiana, relative

to the facts of Dr. Heath's expedition to Mexico in 1824 and his efforts to settle on this land, which was to be filed before the United States Surveyor general at Santa Fe, New Mexico, in support of the claim of the heirs of Dr. Heath for this land. We will show by authorities that this ex-parte affidavit is legal and competent evidence and will ask this Honorable Court to consider the same. Robert J. Heath (page 77) says:

He was a son of Dr. John G. Heath, that some time in the year 1822 his father became the owner through the government of Mexico of a grant of land located in the province of Mexico on the Rio Grande River not far from El Paso, known as the Bracito. That immediately after the grant, the grantee returned to the United States to organize a company in accordance with the provisions of the grant, composed of families, merchants, artizans and farmers, that he also employed a printer and purchased a printing press; also a large quantity of agricultural implements and machinery and all necessary supplies; and with the same went to Mexico, landing at the port of Soto la Marena. That the affiant was one of the party, that after their arrival the Emperor Iturbide was put to death when the country was thrown into a state of revolution. That the Mexican government as then organized refused to permit them to occupy said grant; that they remained in the country for a long time ready and anxious to cultivate and improve said land; that they offered to carry out all of the provisions and stipulations contained in Heath's conveyance; that after remaining some time the authorities of the government of Mexico ordered them to leave the country under pain of imprisonment, and they were compelled and forced by reason of such order to quit the territory of Mexico and return to the United States. The affiant further says that during their stay in Mexico they were persecuted and threatened and the grantee was robbed of all his property by the people of that government, and that the property so taken from him amounted to a sum not less than eighty thousand dollars. That affiant was with said expedition all the time it remained in Mexico and has personal knowledge of all the facts stated in this affidavit.

Mary R. Keedle, John B. Keedle, Eliza J. Bibb, Francis J. Heath, John Best, Esther C. Hunter, and others prove conclusively that the plaintiffs are the heirs and legal representatives of the said John G. Heath and are the only persons or parties intenested in said estate, and they corroborate the evidence of the above witnesses who testified directly to the facts given, by stating what Dr. Heath, Robert J. Heath and other members of the family always said as to their trip to Mexico, their object, purpose and intent. In substance they all said that Dr. Heath, his wife, his son Robert and others always told them that they went to Mexico in 1824 to settle on and cultivate a tract of land called the Bracito granted to Dr. Heath in 1823. That they arrived there in 1824, tried to hold, cultivate and occupy the same, that after the death of Iturbide and his overthrow, the government that succeeded would not let them remain, but forced them to leave upon threat of imprisonment, because the grant had been made during the reign of Iturbide. That Dr. Heath and heirs always claimed this land and hoped to retake possession of it some time when financially able.

HEARSAY EVIDENCE TO PROVE HEATH'S EFFORT TO SETTLE ON AND CULTIVATE THIS LAND.

We submit these depositions are all legal and competent and should be considered by the court. True, part of the evidence is hearsay, but it evidently comes under the exception to the rule that excludes hearsay testimony. Here the important questions to prove relate to settlement, citizenship, domicile, and declarations are always admissible for this purpose. Did Dr. Heath go to Mexico in 1824 to become a citizen of that country, to settle there and cultivate the land, did he voluntarily leave or was he driven out off the land and out of the country, or in other words did Heath abandon his land or was he banished from Mexico?

The evidence of the first seven witnesses giving facts, acts and incidents were declarations of Heath and others with him made in their preparation for and during their trips to and from Mexico is clearly admissible under a host of authorities. While the evidence of the other witnesses relative to abandonment or banishment is equally admissible, abandonment being a continued act—the motive, intent, cause and purpose of Heath's absence can be proved, and declarations showing these at any time are evidence. We admit that hearsay evidence is generally not admissible, but there are exceptions to this rule as well settled as the rule itself. Declarations in one's own favor, when accompanying some act material in issue and a part of the *res gesta*, are always ammissible to prove boundaries, pedigree, bankruptcy, domicile, etc. We shall discuss but one of these exceptions, domicile.

It is a general rule that declarations accompanying and explaining any action tending to throw light upon the intention of the person whose motive is in question, may be given in evidence, and greater latitude in admissions of declarations is allowed in cases of domicile than any other. In any case where the motive or state of mind in which any particular act is done is the subject of inquiry, declarations are admissible. Here, in our case, the important inquiry is, as to the motives of Dr. Heath in going to Mexico, becoming a citizen, taking up land and emigrating there in 1824 with his people, stores and implements, and his return shortly afterward to the United States, so as to determine whether or not he voluntarily abandoned his land and the country, or left there *ex necessitatus*, therefore his declarations when leaving or while making his preparations for so doing, or during his absence and the time of his return, as to his motives for going to Mexico and his reasons for not remaining and leaving there are admissible in evidence. Such declarations accompanying the act clearly belong to the *res gestae*.

Lund v. *Inhab. Lyngsborough*, 9 Cush., 36.
Greenleaf on Evidence, Vol. 1, Sec. 8.
Law of Domicile by Jacobs, Sec. 457.
Wallace v. *Lodge*, 5 Ill. App., 507.

Burgess v. *Clark*, 3 Ind., 250.
Thorndike v. *The City of Boston*, 1 Met., 242.
Woodworth v. *St. P. R. R.*, 18 Fed., 282.
Ennis v. *Smith*, 14 How., 400-422.

It has been uniformaly held that what a party says on leaving home or shortly previous thereto, or while on a journey, is admissible in evidence as a part of the *res gestae*.

Law of Domicile, Jacobs.
Reeder v. *Holcomb*, 105 Mass., 93-4.
Tait v. *Hall*, 12 Pac., 391 Cal.
Penna v. *Ravenel*, 21 How., 103.

Removal, with intent to remain, instantly changes domicile or citizenship; resigning professorship, selling property and at different times telling friends of the determination to remove, are held to be very strong circumstances and competent evidence to prove a *bona fide* intention to change and fix domicile.

Cooper v. *Galbraith*, 3 Wash. C. C. R., 547.

Domicile is controlled by intentions evidenced by declarations as well as by circumstances and facts. Letters and declarations made to friends are always regarded as clear evidence in respect to domicile.

Dupuy v. *Wurtz*, 53 N. Y., 556–562.
Dupuy v. *Seymour*, 66 Barb., 156.

Declarations made by a person at different times from 1818 to 1825, saying where his home was, was admitted upon objections. Affirmed, the court saying:

"We are of the opinion that the testimony objected to was properly admitted. It was part of the *res gestae*. The person being at F——, was setting out from there to go to some other place. *He declared where and for what purpose. His intentions can be known only to himself, except so far as they are communicated by his declarations, and these declarations are legal evidence of his intentions.* Where it is necessary to show the nature of an act, or the intention with which it was done, proof of what was said by the party at the time of doing the act is admissible. (1 Phil. Ev., 218.) Thus, under the bankrupt system, the declarations of a trader at the time of his absenting himself from home are received in evidence to show the motive for his absence. Had the person declared that he was going to consult Dr. Holland as a physician, the proof of such declarations would have been inadmissible. Of the same character in principle is his statement that he was going to Dr. Holland's because that was his home. Such declarations show the intent with which the act is done, and such evidence has always been received.

Gorhom v. *Canton*, 5 Me., 266.
Gable v. *Mays*, 17 At., 565 Md.
Story's Conf. of Laws, Sec. 45, note.
17 Meyer's Fed. Dec., 513.

Respondent prior to 1842 lived in Maine, went to Virginia with view of permanent residence, bought land there, brought part of his household furniture and daughter with him. His declarations made at different times were objected to as evidence; held, they were part of the *res gestae*, and clearly admissible as evidence in explanation of acts."

Burnham v. *Bangely*, 1 Woodbury & Minot's R. 7.

These decisions and principles have frequently been applied to sustaining titles to lands. The claim of Luco *et al.* for lands granted to Josi de la Rosa was rejected on the ground that the grant was fraudulent and antedated. Declarations as to the occupation and ownership of the ranch *pro* and *con* were admitted and considered by the court. It having been proved that Rosa made frequent declarations that he never owned a ranch or never applied for one. The court said the last evidence, however, is met on the part of the claimants by that of two witnesses, Yount and Botello. The first swears that some time in 1846 Rosa told him that he had a ranch; that it lay between Baca and Bidwell's ranch, and was called Pulpones. Botello swears that he remembers that while a member of the assembly he heard some talk of an application of Rosa for a grant; that he does not know whether he ever obtained the grant, nor was he informed of the fact until he recently saw the papers exhibited by the claimants.

Juan Lucca et al v. *U. S.*, Hoffman, 345-354.

In the case of *Lee* v. *Simonds*, 1 Oregon, 158, there was a dispute as to a homestead or residence. Simonds resided a short time on the tract of land in dispute in Oregon. Then he returned to the states. He was allowed to prove that he said when he started back that he was going after his family and intended to return, if he lived, but failed because his declarations did not show that he intended to reside or put his family on this tract of land when they came to Oregon. In our case there is no uncertainty as to the proof on any such points. We prove conclusively that Heath intended to settle and did settle on this identical tract of land, that he went to Mexico for that purpose and was driven off and had to leave the country, not from any fault of his. This case directly rules that our evidence is admissible.

Robert J. Heath's affidavit, as a sworn declaration, is legal and competent to prove every fact therein stated. It relates to Heath's domicil, intent and *bona fide* effort to settle in Mexico on his land and the reasons why he failed and was driven off. By the positive evidence of one of the actors, the supposed abandonment is proved to be a banishment. For this purpose under the authorities quoted declarations have always been received, and *ex parte* affidavits for the same purpose have been admitted in the following ten cases:

U. S. v. *Knight*, 1 Black, 250.
Doyle v. *Clark*, 1 Flipp, 536, 1 U. S. C. R.
Hamilton v. *Dallas*, 1 Ch. Division, 257.

In re. Gould's Will, 9 N. Y. S., 417.
In re. Zeragas' Will, 20 N. Y. S., 407.
McKensie v. *McKensie*, 23 N. Y. S., 278.
Morlon v. *Folger*, 15 Cal., 275.
Cornwall v. *Culver*, 16 Cal., 428.
Gardner v. *Cornell*, 5 La., 353.
U. S. v. *Boisdore*, 11 How., 89.

In the Knight case, which was a claim for a supposed Mexican grant, an *ex parte* affidavit of Davis was offered, in which the affiant stated that he had heard Knight say in the camp of Colonel Fremont that he had just returned from the lower country, where he had procured his title papers; that he exhibited certain papers, which witness did not examine; another witness testified that he saw Knight in Los Angeles, "and that he said he was there for the purpose of getting a grant for ten leagues of land on the Sacramento River, and that Governor Pio Pico told him that he had issued the grant." This affidavit and hearsay evidence were received and considered by the lower court and the Supreme Court of the United States.

The case of *Doyle* v. *Clark*, 1 U.S. C. R., 1 Flipp, 536, and 14 Myers Fed. Dec. 510, is important. An *ex parte* affidavit of counsel stating that plaintiff had told him that she intended to become a citizen of Michigan, was considered the important point in the case. The court admitted the rule that declarations of intention as to domicil were always admissible, but held that as the declarations in this case were made with a view of controlling the case were not sufficient to overthrow other facts which showed there was no real intention of removing—no sale of property, etc.

In the case of *Hamilton* v. *Dallas*, 1 Ch. Division 257, the question was whether a peer of the British Parliament could and did acquire a domicil in France. Held the test of domicil must always be the animus and the factum and could always be proved by circumstances, acts and declarations. Sale of property and preparations for leaving as shown in our case, were regarded as a controlling factor. Letters written and declarations made at different times showing his intentions were admitted and these were proved by *three ex-parte affidavits, one of which was an affidavit made by the peer and filed in a case against him by Albano*, in which he explains his residence in France and expresses his determination not to return to England.

These cases are conclusive upon the point that the declarations and affidavit we offer are competent and legal evidence to show that Heath did go to Mexico with intent to remain as a citizen, establish his home there and occupy and cultivate the land, and the further fact that he did not abandon his land, but that he was driven out of the country, thus explaining why he came back to America.

Now, in view of these authorities, every word of these de-

positions of Hughes, Bryan, Mrs. Carranco, Cooper, Herrera and Robert J. Heath are admissible. They testify to acts and declarations accompanying the *res gesta*, but to prove banishment or to explain the supposed abandonment the authorities recognize a wide latitude. For this purpose declarations need not be confined to any fixed or prescribed period. If, as we have shown, and that too by direct evidence that Heath did not abandon his land, but was driven out of the country, the banishment became a continued act, and declarations made at any time explaining the subject-matter clearly belong to the *res gesta*, therefore the depositions of our other witnesses are admissible.

Lund v. *Inhabitants of Tyngesborough*, 9 Cush., 43.

While absent the motive, intent, cause and purpose can be shown and declarations proving these at any time are evidence.

Lord v. *Colvin*, 4 Drewrys R., 366.

Any declaration made during residence abroad explanatory of it or of the present intention of the party regarding it, may be given in evidence. Removal and absence are looked upon as one continuing act.

Domicil by Jacobs, 453.
Greenleaf Evidence, Sec. 110.
Ransom v. *Hale*, 2 Bing., 99.

In the case of *Lick* v. *Diaz*, 44 Cal., 37 Cal., 437, the defendant was allowed to prove "that said Juan Prado Mesa before he died, made statements asserting title to the undivided one-half thereof," etc. Plaintiff excepted. Supreme Court held: "It is thus seen that in admitting in evidence the declarations of Mesa the court below but followed the views of the court, as expressed here in the former appeal, and which had become the law of the case upon the points in question."

In the case of *Tobin* v. *Wilkinshall*, 1 McAllister, 186, 5 Myers Fed. Dec., 765, the question arose whether Forbes, one of the defendants, was a citizen or subject of Great Britain. The judge found he was an alien. Motion to set aside the verdict on the ground that testimony as to acts and declarations of the party made and done *ante liter motam* tending to show what country he elected to adopt, were improperly permitted to go to the jury. To sustain that defendant was an alien, plaintiff proved that two actions had been brought in state courts against defendant; that upon petition alleging that defendant was an alien, the cases had been removed to Federal court; that a verdict had been given citing that defendant was a subject of Great Britain; that defendant's attorney swore to the fact. Also, it was testified by a witness that in 1851 defendant *told him he was not a citizen of the United States; that he did not intend to become one*, because he wanted to be able to litigate in the courts of the United States. This

testimony was objected to as incompetent, and the objection overruled. The court held: It is settled that the declarations and acts of a party are admissible to qualify and explain his intentions in removing and the character of his residence in a question of domicil. In the case of *Inglis* v. *Saylors Snug Harbor*, 5 Peters, 123, the court say:

"It surely cannot be said that nothing short of actual removal from the country, before the Declaration of Independence will be received as evidence of election. And proceeded to consider the acts of the party adduced as evidence to qualify and characterize the remaining in the country. Now, inasmuch as other acts besides that of removal may be received as evidence of the manner in which the right of election was exercised, the court considers the testimony competent. In the case at bar defendant remained in this country, and to ascertain his intentions in remaining, his acts and declarations, though made subsequent to the time, were left to the jury to find in what manner he had elected."

In question of abandonment wide range and great latitude is always allowed. Courts never refuse facts, declarations and circumstances from which any aid for the solution of the question can be derived. Proof of any claim to the property, no matter how manifested, is admissible. We have proved by all our witnesses that Heath claimed and asserted an ownership over this land; always said he owned it, and had not abandoned his claim, and hoped that the wrong which had been done to him in being driven out of the country would be righted some day. This was his talk to all the witnesses we have called. Major Hughes and Mr. Woodruff were on this land in 1847, knew at the time it was Heath's land, and so told those who were there. Then, when they returned, talked to him about his ownership, and Heath tried to sell the land. That these acts and declarations were all legal evidence to prove there was no abandonment is clearly sustained by high authority.

In the case of *Bell* v. *Bed Rock T. & M. Co.*, 36 Cal., 216, the plaintiffs offered to prove that one Williams proposed to purchase the claim in dispute from them, and that they refused to sell. Defendant objected upon the ground of irrelevancy. Court said:

"As we have held in the case of *St. John* v. *Kidd*, 26 Cal., 263, in order to sustain an allegation of abandonment, it must appear that there was a leaving of the claim without any intention of returning or making any further profit. The leaving being established, it is competent for the aforesaid party to show any acts explanatory of the leaving which tend to show that it was not accompanied with intent not to return. Thus in *Richardson* v. *McNulty*, 24 Cal., 339, we hold a judgment roll in an action by Richardson to recover the same ground against other parties was admissible upon the question of the intent with which he had left the ground, and tended to show that he had not left with the intent not to return. We also hold the same doctrine in *Wilson* v. *Cleveland*, *supra;* and in conclusion said: Upon a question of abandonment as upon a question of fraud a wide range should be allowed, for it is generally only from

facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove all facts or circumstances from which any aid for the solution of the question can be derived."

Again we say all the evidence we offer is admissible and sufficient because in equity courts the rule of evidence is always more liberal than in law courts. The disposition of this honorable court and all others is to be very liberal (and rightly so) in permitting evidence to establish old Mexican titles. At this date it is difficult to find many witnesses who took an active part in the scenes and incidents of those days when these Spanish and Mexican grants were made. When supported by the records, few facts and circumstances should be sufficient to have them confirmed. Under the statute of 1891 these claims are to be determined by equity, justice and the laws of nations. The tribunals of the United States, in passing upon the rights of property claimed under grants from the Spanish and Mexican governments, are governed by the stipulations of the treaty, the law of nations, the laws, usages and customs of former governments, the principles of equity and the decisions of the Supreme Court. They are not required to exact a strict compliance with every legal formality.

In the case of *U. S.* v. *Johnson*, 1 Wall., 326, the court said:

"In taking objections to these Mexican grants it ought to be remembered that the case is not brought here on a writ of error with bill of exceptions to the admission of every item of testimony offered and received below. *Nor is it a part of the duty of counsel representing the government to urge microscopic objections against an honest claimant and urge the forfeiture of his property for lack of proof according to the strict rules of common law.*"

In *U. S.* v. *Auguisola*, 1 Wall., 352-8, Justice Field, affirming the Johnson case, added:

"The United States government never sought by their legislation to evade the obligations devolved upon them by the treaty of Guadalupe, Hidalgo, *to protect the rights of property* of the inhabitants or the ceded territory, or to discharge it *in a narrow and illiberal manner. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they succeeded.*"

Conditions of cultivating and occupation relieved by acts of grnator on account of subsequent revolution preventing performance.

Performance on our part was attempted in good faith and at great costs, and full performance was prevented solely by the act of the granting government, by its officers, after a revolution boldly repudiating and denying the grantee's rights. This brings our case within the *cy pres* doctrine in equity which has been ap-

plied so often, namely: performance, as far as possible, followed by hindrance and prevention on the part of the grantor, relieves the grant of the forfeiture and therefore our claim should be confirmed.

U. S. v. *Arredondo*, 6 Peters, 691.
U. S. v. *Sibbald*, 10 Peters, 13–323.
U. S. v. *Larkin*, 18 How., 557–563.
U. S. v. *Fremont*, 17 How., 542; 1 Hoffman, 20.
U. S. v. *Reading*, 18 How., 1.
Glenn v. *U. S.*, 13 How., 250–259.

But it is claimed by the defendants that under the statutes of 1891 no grant, containing conditions, when said conditions have not been complied with, can be confirmed. The gentleman's contention is not correct as a matter of law, and when applied to our case is not supported by the record. Here now there is no condition, and our grant contained none when our land came into the United States. There is no condition precedent or subsequent in our grant. The act of 1823 did impose a subsequent condition of forfeiture, but that was destroyed, blotted out by the repeal of the law. It was then that all conditions or requirements of our grant, if any, were annulled, the same as if they never existed.

Authorities on p. 96 of Argument.

Again this original condition of subsequent cultivation was waived and excused by the acts of the grantor and for this reason was the same as though it never existed. No act of Congress, by implication or otherwise, can revive or put into effect a repealed law of Mexico. The condition of our title at the date of the treaty must determine our right—there being then no operative condition to effect our title, our grant should be confirmed. As conceded by the counsel, "the United States government has no right to prescribe terms and conditions not consistent with the performance of the duties and the faithful discharge of the obligations imposed upon it by the transfer of the ceded country." To attempt to impose a limitation upon the Heath grant, and refuse its confirmation by reason of a condition which had been excused, annulled or repealed by the acts of the Mexican nation, would be illegal and void according to the laws and constitutions of Mexico and United States and the treaty between the two nations.

In construing the treaties of the United States with Mexico, it has frequently been held that the showing of any legal or equitable excuse for the non-performance of conditions subsequent always entitled a claim to confirmation. This is the well settled rule of construction of the treaty of Guadalupe Hidalgo, and is the established rule of the acquisition of all property under the treaty. The contention of the defendants would destroy this rule

as well as many valuable property rights in New Mexico and other territories.

The act must be construed as a whole, and as such it requires this court to decide all claims according to equity, justice and right. The decisions hold that in equity, excuse for non-performance of conditions subsequent is equivalent to performance.

Again, the position of defendants when applied to concessions, imperfect or incipient donations, when by reason of conditions never having been performed, no title ever inured may be correct, but as to perfect titles where the fee was vested in the grantee subject to the possibility of forfeiture on account of a failure to do something, their contention is not applicable to this last class of cases, the provisions of the eighth subdivision of section 13 of the act creating this court does not apply. That this subdivision has reference to incipient, inchoate titles only, is plain from the language used. "No concession, grant or other authority TO ACQUIRE LAND" is the language of the section. It is manifest the word "grant" is not used here in the sense of anabsolute title.

Our rights are not based upon a concession. We are not claiming a right "*to* acquire land," but are asking this court to say that Dr. Heath did acquire this land by the grant of 1823, and we want our title thereto to be quieted as against the United States. We claim under section 8 and not under section 6 of the act of 1891. We are informed that the United States Land court has sustained this construction of the act of 1891 in the case of *Coe* v. *The U. S., and other* cases.

We submit there is nothing in this act which requires the court to depart from, or waive the application, of the high principles that have characterized the legislation of our government, and the judgment and decrees of our courts, in respect to property rights in ceded territories, and so believing, will proceed upon the theory that this court will accept and receive all evidence which tends to prove any waiver or valid, legal or equitable excuse for the non-performance of conditions subsequent.

In *U. S.* v. *Vaca*, 18 How., 556, the court said:

"It is a condition subsequent, which at the worst only left the title of the grantee open to be denounced, but as the claimant was *hindered from performance by the revolutionary state of the country, the non-fillment of it would not work forfeiture of his title.* By the 14th section of the act of March 28th, 1804, which established the territories of Orleans and Louisiana. Clamorgan was prevented from doing any future act in support of his title, had he been disposed to do so. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment."

Glenn v. *U. S.*, 13 How., 249.
U. S. v. *Larkin*, 18 How., 557.

In the case of *Fremont* v. *The U. S.*, 17 How., 506, it is said:

"Regarding the grant to Alvardo, therefore, as having given him a

vested interest in the quantity of land therein specified, we proceed to inquire whether there was any breach in the conditions annexed to it, during the continuance of the Mexican authorities. which forfeited his rights and revested the title in the government. The main objection on this ground is the omission to take possession, to have the land surveyed, and to build a house on it within the time limited within the conditions. It is a sufficient answer to this objection to say that negligence in respect to these conditions and others annexed to the grant does not of itself always forfeit the right of the grantee." Affirmed in *Reading* v. *U. S.*, 18 How., 6.

In *U. S.* v. *Arredondo*, 6 Peters, 697, it is said:

"The condition of settling two hundred families on this land has not been complied with in fact; the question is, has it been complied with in law, or has such matter been presented to the court as dispenses with the performance and divests the grant of that condition. It is an acknowledged rule that if a grant is made upon a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single. We are not prepared to say that the condition of settling two hundred families has been or is impossible; the condition was not unreasonable or unjust at the time it was proposed. Its performance would probably have been deemed a fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States would be demanding the *summum jus* indeed, and enforcing a forfeiture of principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. *If the case required it, we might feel ourselves at all events justified, if not compelled, to declare the performance of this condition had become impossible by the act of the grantors, the transfer of the territory, and the change of government, manners, habits, customs, laws, religion, and all the social and political relations of life and of society.*"

The case of McMicken v. U. S., 97 U. S., 204–214, makes a distinction between conditions precedent and subsequent and perfect and imperfect titles, holding that the conditions of inhabitancy and cultivation annexed to imperfect titles were always considered as material and essential; then discussing conditions in complete title said:

"We have been referred to some cases decided by this court which are supposed to treat the conditions contained in these titles as of no importance, and as not necessary to be performed. But it will be found that these cases related to perfect grants or that they are otherwise distinguishable from cases like that now under consideration."

Then affirming many of the cases we have quoted, said:

"There is nothing in any of these cases inconsistent with the assertion of the forfeiture in the case before us. Here no title was granted; nothing but a permit to inhabit and cultivate, as preliminary to a grant. It might have ripened into an equitable title had the conditions been fulfilled, *or even if a fair effort had been made to fulfill them, or if any plausible excuse could be offered for their non-fulfillment. But no attempt even appears ever to have been made to fulfill them.*"

The authorities are very numerous which hold that all acts on the part of the grantor, which interfere with, hinder or prevent performance of conditions precedent or subsequent, will avoid the conditions, excuse performance and render the grant absolute.

Washburn on R. P., 4th Ed., 453–4.
Freeman on Real Property, Sec. 27 1, 3-4.
4 Keat's Comm., 130, 3 Wait's Actions & Defs., 74.
Puffendorf, 307; 1 Bacon, 680.
Leading cases on Am. L. R. P., 146.
Houghton v. *Steele*, 58 Cal., 421.
Jones v. *Chesapeake R. R. Co.*, 14 W. Va., 514.
Jones v. *Walker*, 13 B. Mon., 163.
Jones v. *Bramblet*, 1 Scammon, 276 Ill.
Young v. *Hunter*, 2 Selden, 203.
Majors v. *Hickman*, 2 Bibbs, 217.
Kuidekoper v. *Douglass*, 4 Dall., 392, 3 Ch. 1.

The conduct of one party to a contract which prevents the other from fulfilling his part is an excuse for non-performance.

Addison on Contracts, Sec. 326.
Fleming v. *Gilbert*, 3 Johns, 527 N. Y.
Ketchum v. *Zeildorff*, 26 Wis., 514.
Benj. on Sales, 4 Art., pp. 640-511 and 566.
Texton v. *Hutchings*, 62 Md., 150.

It is expressly provided by the laws of Mexico that a condition will be held as fulfilled, which fails to be realized by the act of the obligated party.

Hall's Mexican L., p. 629, sec. 2481.

If there had been a forfeiture and the party entitled thereto, either expressly or by his conduct, waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by releasing against, it if necessary.

Pomeroy's Equity Jus. Sec. 451.

It is held that when a condition subsequent is once dispensed with, the estate becomes absolute in the grantee, and cannot be divested by any future breach. If dispensed with in whole or part, it is gone forever, and there can be no right of entry for any subsequent breach or delay.

44 Am. Decisions, Note page 748.
Dumpors case, 1 Smith's Leading cases, 85.
Ludlow v. *N. Y. R. R. Co.*, 12 Barb., 440.
Clark v. *Jones*, 1 Denio, 516.
Wait's Actions and Defense, p. 74.
Dickey v. *McCullough*, 2 W. & S., 88 Pa.
Sharon Iron Co. v. ....., 44 Pa., 341.
2 Am. Leading Cases, 629.

Ely v. Cole, 2 Gilman (Ill.) 573-4

This proposition has never been denied, yet was limited in the case of *Davis* v. *Gray*, 16 Wall., 203, by the court holding and incidental that when the hindrance by the grantor was of a temporary nature, as it was in that case, the building of a railroad in Texas being suspended by the war of 1861, and not a direct wrongful act of the grantor, equity would not apply the rule of blotting out the conditions forever, but would only excuse performance for the time being.

This doctrine has no applicability in our case. Here the excuse, or the prevention and hindrance, were absolute and continued; so, too, was its operation and effect. Here the adverse action was by the grantor against the grantee, and the prevention was not incidental and growing out of the turbulency of the times, but a direct personal interference with by the party to whom the promise was made defeating the promise. The court in affirming our position, said:

> "The rule of law is, that if a condition subsequent be possible at the time of making it and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested is not thereby divested but becomes absolute. The analogy of that rule applied here would blot out these conditions. But this would be harsh and rank injustice. Equity will therefore not apply the rule to that extent. It will regard the conditions as if no particular time for performance were specified. In such case the rule is that the performance must be within a reasonable time."
>
> *Davis* v. *Gray*, 16 Wall., 230.

This rule can not be applied to our case, and it is manifest that nothing here said militates against our claim. Heath tried to perform his part of the contract, he went there in time, ready, willing and able to do all he agreed; he stayed two years, spending a large sum of money in trying to occupy this land, and was prevented from so doing by hindrance and obstacles interposed by the grantor, actually precluding or preventing performance by him. This interference was absolute, as Heath was finally driven from the country a bankrupt, under threat of imprisonment or death. Under all the authorities, what he had done gave him the land forever.

The case of *Davis* v. *Gray* is discussed by his Honor, Judge Harlan, in *Farmers T. & L. Co.* v. *Chicago, P. & S. Ry. Co.*, 39 Fed., 143–152. The principles held in this case as well as those established in its reversal are important to us. *Angle* v. *Chicago & St. Paul Ry. Co.*, 151 U. S., 1.

By act of March 4, 1874, the State of Wisconsin granted certain lands to a railroad called the Omaha Company, and certain other lands to the Portage Co., upon conditions: Subsequent to building and completing the road in five years, March 16, 1878, time extended three years. In the panic of 1873–74, Portage Co. broke down and remained inactive until 1880. Afterwards made some arrangements with capitalists to carry on the enterprise. The

Omaha Company conspired with the other parties to wrest from the Portage Co. its land grant, got control of its stock, causing the work that had been commenced to be suspended; then got the legislature of Wisconsin to pass an act forfeiting the grant to the Portage Co. and bestowing it upon the Omaha Co. Judge Harlan did not think that annulling the grant made to the Portage Co. brought the case within the rule of the Davis case; that when a condition subsequent became impossible by the act of the grantor, etc., the estate being once vested is not thereby divested by the failure, but becomes absolute.

He further said that this rule cannot be applied to the preseut case. It is not to be disputed that the revocation of the grant to the Portage Co. had an injurious effect upon its creditors. But in a legal sense, such revocation by an unconstitutional, void act of legislature—which the plaintiff affirms the act of February 16, 1882, to be—cannot be said to have made impossible the performance of conditions upon which the company's title to the land depended." This opinion was reversed by this court holding that the repeal of the grant, as well as many other acts done, did hinder, delay and prevent the carrying out of the contract on the part of the Portage Co. and that on account of these wrongful acts, all the wrong-doers were estopped from taking advantage of the non-performance of any condition subsequent.

151 U. S., 1–27, where both opinions are reported.

Equity will not apply the exception, to the universal rule adopted in the Davis case, to our case. If by reason of the revolution, or for any other unjustifiable cause the Mexican authorities prevented Heath from settling on his land and fulfilling the conditions of his contract, why should not these conditions be blotted out forever? Here no question of performance in a reasonable time could arise in equity. He was not driven out temporarily, but banished forever. He had spent his fortune to get there, and went home a bankrupt. It cannot be held he was required to return. The government of Mexico having done the wrongful act, is ever after estopped from taking advantage of its own wrong. Mexico could not "*play fast and loose*" with Heath by dispensing with the condition at one time and insisting upon it at another. Dumper's Case, 1 Smith's L. C. 85, 44 Am. Dec., 748.

Marshall v. *Craig*, 1 Bibb., 379, 4 Am., Dec., 647, is in point, where it is held the purchase of Briscoe's claims was a wrongful act. That this purchase was a *perpetual bar* of his right against Craig, and operated as a total discharge of Craig, seems to follow from settled principles of common law, and being made so by the act of the obligee himself, the obligation is discharged *forever*.

Shep. Touch., 393—Co. Litt., 206.
People v. *Cook*, 30 How. Pr., 110.

The question to be determined by this court is, could the Mexican government, at the date of concession of this land, have re-

fused this title upon the principles of right, law and equity? From the facts as we have shown them, that government was estopped from pleading either abandonment or forfeiture or laches. So, too, is the government of the United States; the court cannot inquire into any act or omission by the grantee since the Mexican authorities were displaced. It is not authorized to pronounce a forfeiture for anything done or anything omitted by them since that period.

Hornsby v. *United States*, 77 U. S., 239.
McMicken v. *U. S.*, 97 U. S., 217.
U. S. v. *Sutter*, 21 How., 178.
New v. *U. S.*, Hoffman 162.
U. S. v. *Clarke*, 16 Pet., 218–225.
6 Pet. 706; 7 Pet. 51; 10 Pet., 321.

LACHES.

Defendants knew of our title, and were bound to take notice of the record, and with this knowledge cannot rely upon any charge of laches. A trespasser with knowledge cannot plead laches.

McGee v. *Chadron*, 30 Tex., 644–661.
Howard v. *Perry*, 7 Tex., 266.
Morris v. *Byers*, 14 Tex., 278.
Ferris v. *Coover*, 10 Cal., 589–632.

We concede that if Heath had not attempted to fulfil his part of the contract the forfeiture might be enforced, but we insist that the Mexican Government, having prevented that performance, is now estopped from asserting it, and equity will aid Heath by relieving against the forfeiture; and in such case hindrance prevents the operation of laches.

1st Pomeroy's Eq., Section 451.

The courts all hold that forcing a party to leave the country cannot operate to his prejudice, and that a man forfeits no right who flies from the strong arm of power.

Stark v. *Mater*, 1 Walker, 183; 12 Am. Dec., 553.
Handy v. *DeeLeon*, 5 Tex., 211.
White v. *Burnley*, 20 Howard, 250.

There was no abandonment, the premises not having been left voluntarily.

Moon v. *Rollins*, 36 Cal., 339.
Pothiers Treaties on Possession Ch. 5, Act 7, Sect. 2.

Upon this point the language of the court in *Stark* v. *Mater*, *supra*, is very applicable to our case:

"Shall therefore the absence of these parties of necessity, and not of choice, be held by us to defeat a right, founded in justice and equity, and which had actually vested in him, and had never in any legitimate way by

any competent authority been vacated or annulled? We think not. It would be to make this court the hand-maid of oppression, a chancery to consecrate the wrongs and enormities of a licentious power."

"The doctrine of laches has no just application to this case. It is applied by analogy to the statute of limitations, to promote, not to defeat justice. The patent certificate and the mortgage were on record in the office of the register of deeds in the county in which the lands were situated. He took the land with the actual and constructive notice of the material facts in which the equitable rights of the appellee rest."

Bogan v. *Edinburgh Am. L. M. Co.*, 63 Fed., 192-9.

Complainants in an equity suit are not chargeable with laches caused by the defendants themselves.

Gunter Carroll, 101 U. S., 425–7.
Ridgway v. *Wharton*, 6 H. L. Cas., 292.
Fry on Specf. Perf. Sect. 1114.

If plaintiff's delay has been caused by this act of defendant, the latter cannot plead the plaintiff's laches as a bar to the suit.

12 Am. & Eng. Ency. S., 560.
Sugg v. *Thrasher*, 30 Miss., 135–142.

If Heath was driven out of Mexico, then there was no breach of contract on his part and no forfeiture occured, and there could be no laches envoked against him, unless there has been a breach or forfeiture.

Am. & Eng. Ency. of L. V., 567.
Town of Middleton v. *Newport*, 15 Al., 800.

The principle of estoppel is applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title and does not interfere to prevent the work or inform the party of his own title. This would be a fraud, and the owner would not afterwards be permitted to receive the property, without at least making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the character of the title, and *a fortiori* where the owner was not present but unlawfully banished, the court leaving his title of record to speak for him. He who makes improvements with knowledge of another's title, is wilful and acts at his peril.

Steel v. *St. Louis Smelting Co.*, 106 U. S., 447–56.
Brant v. *Virginia C. & I. Co.*, 93 U. S., 326, 337.
Henshaw v. *Bissell*, 18 Wall., 271.
Crest v. *Jack*, 3 Watt., 238-240.
Knouff v. *Thompson*, 4 Harris, 357–363.
Carr v. *Wallace*, 7 Watt., 401.

If a stranger builds on land knowing it to be the property of

another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

Ramsden v. *Dyson*. L. R., Vol. 1, Eng. and Iris. App. Cases, 129.
Bigelow on Estoppel, p. 670.

If a person about to act has knowledge, then there can be no estoppel *in pais*.

The Greensburgh Co. v. *Silener*, 40 Ind., 424.
Robins v. *Mayer*, 75 Ind., 389.

The party who has placed his title on record has given notice which every person is bound to know and respect. The law distinguishes between silence and encouragement. By words or acts one may mislead another into expenditures on his property, and this would be a positive fraud, while to remain silent would be innocent and lawful.

Knouff v. *Thompson*, 4 H., 364.
Alexander v. *Kerr*, 2 Rawle, 90.
Goudie v. *Northampton Co.*, 7 Barr, 233.

The facts sustain the proposition that "the doctrine of laches has no just application to our case." See depositions of Major Teel, page 135 of record, Gregoria Herrera, page 132, and page 56 to 59 of our argument. Also see page 127, Abandonment.

In the *U. S.* v. *Hughes*, 13 How., 3; *Fuentes* v. *U. S.*, 22 How., 443–461, and a few kindred cases, the question of *laches* was considered, but this was solely for the reason there was no attempt to perform the conditions, and no excuse given for not doing so; but we have found no case, upon an examination as thorough as opportunity would permit, to which *laches* have ever been applied to defeat a claim where abandonment was not proved to be voluntary and there was evidence of banishment. *Laches* must be founded upon equity, and equity promotes justice and hinders wrong. The defendants are not in position to invoke the salutary principles of equity. Their possession was obtained with constructive and actual knowledge of our title; not according to law, but in absolute violation of law, the Act of Congress of 1854 having provided "that all lands covered by Mexican claims should be reserved from sale or other disposal." Such possession and title being not only voidable but absolutely void, can not be protected by invoking the principles of *laches*. (See argument on sixth point, page 143.)

All cases to which the equitable rule has ever been applied, are unlike those which arise in the territory covered by the law of 1854. To apply the principles of *laches* to such cases and under such circumstances, would be lending the aid of a court of equity to perpetuate a wrong.

The case of *U. S.* v. *De Repentigney*, 5 Wall., 211–268, sus-

The proposition we argue, namely, that defendants having taken possession with actual and constructive knowledge of our rights, contrary to law are mere trespasses without color of right, and are therefore without any interest in the land to give them a stand in court to claim latches or to set up legal claim against plaintiffs whatever. They have been absolutely prohibited from this not only by the act of July 22, 1894, but also by the law of Congress organizing the territory of New Mexico, Part 1494-1497. This statute expressly provides: "No person shall in any case, hold or possess under title nor in any manner a portion of land within the limits of a Mexican grant." This was a law of Congress having full and exclusive jurisdiction of the subject matter. By virtue of these laws as well as others, defendants could obtain no interest in this land to give them a standing in court; therefore they are prohibited by these statutes from asserting any claim of latches against us—their title being against law void, and their possession equally so.

Winsor vs O'Connor, 69 Tex. 571-8 S. W.
Sherwood vs Fleming 25 Tex. 408 Sup.
Whitney vs Mac A Fee 1st Pa. 173- N. M
Therman vs Brick 93 U. S. 209.
Sutton vs Fasset 51st Cal. 13-15.

tains the point we argue. Here more than a century elapsed before the land was claimed—for thirty years there was no record filed, and the government of United States knew nothing of the grant; no steps were taken in fulfillment of the conditions, the claimant having left the country voluntarily, saying that he would not lose his Royal title for all lands in America, and yet this court refused to defeat the title on the ground of laches or abandonment, and put the case upon the ground that, as the United States succeeded to all the rights of this territory that existed in the King of France, and under the treaty of 1773 with Great Britain, had a right to sell the land, the same as the King had it continued under his dominion, and having lawfully sold the same, that was equivalent to office found. But how unlike this is our case, where by act of Congress of 1854 all lands covered by Mexican grants were reserved from sale and disposal. In the first case sale was lawful, in the second unlawful. Equity will invoke the principles of laches to protect the one, but not the other. All donations and sales of land covered by the Heath grant was contrary to the act of Congress of July 22, 1854, and for this reason all patents issued therefor were made so as "not to affect the adverse rights of any person whomsoever," or, in other words, they were issued subject to Heath's Mexican grant. And it is held: If title by patent is subject to a former right, the former right must prevail. In such case the patentee accepts the title of the United States with knowledge that another claim exists, and that he does not intend to deny or destroy it, nor to defend his title against it. *Bybee* v. *Virginia Ry. Co.*, 139 U. S., 674–8. See argument on 6th point, page 143.

It is said in *Lerma* v. *Stevenson*, 40 Fed., 356–9 (grant made by town council of El Paso, see p. 47 of argument), that grant was within the protection of the treaty and the Constitution of the U. S. could not be nullified as a *stale claim* without judicial inquiry.

Laches is an equitable defense, controlled by equitable considerations. He who makes the claim must have an equitable foundation of his own right, such as would make it inequitable to recognize the claim of the party asserting title against him. And that right cannot be founded upon an illegal or void deed or possession or upon a subsequent title subject to the right against which the principles of laches are sought to be invoked. In such case the claimant does not come with clean lands. Pomeroy's Eq. Juris., Sect. 816. Here no perfect legal title has been created in reliance upon the absolute termination of all interest in us or neither has any competent authority decided our title worthless. In no such case have even the principles of laches been applied. These and other facts distinguish our case from those where the equitable rule of laches is allowed.

Property of Catholics protected. Heirs of foreigners inherit land in Mexico unless denounced.

The act of 1823 protects the property in Mexico of all foreigners who are Catholics.

That Dr. Heath was a Catholic is clearly proven by the oral evidence, and the grant itself shows this. There could be no forfeiture of our grant by reason of the fact that Dr. Heath subsequently left Mexico or became a foreigner. This is prohibited by the express provisions of the law of January 4, 1823, under which the grant was made.

Art. 1. The Government of the Mexican nation will protect the liberty, property and civil rights of all foreigners who profess the Roman Catholic Apostolic religion, the established religion of the empire." (page of brief.)

The learned gentlemen say:

" This fantastic proposition is based neither upon fact nor law. It is not correct that the provisions of Art. 1 are peculiar to the law of 1823."

but gives no reason to the contrary. They say the Spanish government required the profession of the Roman Catholic religion, and that no other religion was recognized. Who denied this? We did not, but so stated in certain parts of our brief. But we did assert and now repeat that the first section of the act of 1823 gave certain rights, privileges and protection to *property of foreigners who were Catholics not found in any other law in Mexico*, If article 1, as defendants claim, meant nothing more than that the government would protect the liberty, property and civil rights of foreigners who professed the Roman Catholic religion as long as they were domiciled in Mexico, why did they not so state and why does this provision differ so much from other laws? We must interpret a law just as we find it. The courts have no right to iterpret into a statute a qualification not found therein. The counsel's interpretation will suit the law of 1824, but it is not applicable to the statute of 1823. Both the meaning and language of this law of 1824 is just what the counsel would have you hold the acts of 1823 should be. Compare the statutes.

Art. 1 of Act of 1824.--"The Mexican Nation offers to *foreigners who come to establish themselves within its territory* security for their persons and property, provided they subject themselves to the laws of the country."

Sec.15.--Non-Residents.--"No person who by virtue of this law acquires a title to lands shall hold them if he is *domicilated out of the limits of the republic*."

Here is an express limitation to the protection of the property of foreigners, they must establish themselves in the country, and then no one can hold property if he is domicilated "*out of the limits of the republic.*" There is no such limitations found in the law of 1823. Here the rights of foreign Catholics to hold property is unlimited. Nothing is said about establishing themselves in the country or being domicilated out of the republic. It gives a special privilege to Catholics to hold real estate in Mexico. No such provision is found in any law prior or subsequent. Under other laws the Mexican nation offers protection only to foreigners who would come to the territory and subject themselves to the laws of the country,providing further that if they left, they would

lose their property. Therefore, by the early decisions it may have been held that under these statutes leaving the country or selling land to a foreigner was a forfeiture in itself, without judicial denouncement. But this rule cannot be applied to our case, as it was a part of the contract under which Dr. Heath took the grant that his property was to be protected while he was a foreigner as well as a citizen, he being a Catholic. For this reason our case is brought within the exception to the rule argued by defendant's counsel that a foreigner cannot transmit property by descent.

The exception is as well settled as the rule itself.

If the title to land is conferred on an alien by law, if by law as by statute or treaty he is enabled to acquire, by descent or purchase, and hold land as a citizen, he may maintain any actions in respect to it which a citizen may maintain. Thus by the constitution of the republic aliens were allowed to hold land by title eminating directly from the government. (Gen. Prov., Sec. 10.) So as the division of an empire works no forfeiture of a right of property previously acquired, aliens are entitled to hold the lands they had acquired by descent or purchase before the change in government. *Jones* v. *McMasters* 20, How., 8-20-21.) In these and other cases where the law recognizes an alien as a rightful owner of the estate, he may convey, lease, and do every other act in relation thereto, and can maintain any action and have the benfit of any remedy which the laws give to secure the enjoyment of the property to those the law recognizes as entitled to its enjoyment.

White v. Sabariego, 23 Tex., 243-246-7.
People v. Folsom, 5 Cal. 374-369.
Hanrick v. Patrick, 119 U. S., 156-169.
Airhart v. Massieu, 8 Otto, 491.
Phillips v. Moore, 100 U. S., 208.
Hardy v. DeLeon, 5 Tex., 239-240.
Jackson v. Beach, 1 Johns Cases, 399.
Merle v. Matthews, 26 Cal., 456.

And these authorities clearly hold that, no forfeiture by denouncement having been declared prior to the admission of Mexico into the United States, none for this reason can be enforced now.

The principle of *Yates* v. *Iams*, 10 Tex., when applied to the Statute of 1824, and the laws of Coahuila and Texas may be correct, for the reason that by the law itself the land was forfeited when owner was domicilated out of the Republic. But that was not the law of Spain and Mexico prior to 1824. Escriche says that if a foreigner dies out of Mexico his property shall not be confiscated, but shall be delivered to his heirs, though they may be foreigners, and that the right of escheate does not exist in Spain.

Settegast v. *Schrimpf*, 35 Tex.. 341.

But *Yates* v. *Iams*, and kindred cases have been modified by the more recent decisions of the courts of Texas and the Supreme Court of the United States. It is now clearly held that foreigners

may hold real estate, that upon their death their children take a defeasible title to the land, which title is valid both against individuals and the government until by some proper proceedings in the nature of office found, a forfeiture is declared.

Harrick v. *Patrick*, 119 U. S., 146–168.
Phillips v. *Moore*, 100 U. S., 208–210.

And especially is this rule true as to the property the title to which had once become vested in a Mexican citizen. There is a distinction between that class of cases where a party who had abandoned the country afterwards sought the government to perfect an inchoate or imperfect title, and cases where forfeiture of a perfect title on account of an abandonment of the country. The first class of cases are the Texas decisions quoted by the defendants, which hold that forfeiture occurs upon voluntary abandonment, but in the latter class it is settled that a forfeiture must have been pronounced according to due course of law.

Sabrego v. *White*, 30 Tex., 578.
Jones v. *Monts*, 15 Tex., 357.
Kilpatrick v. *Seneros*, 23 Tex., 113–129.
White v. *Burnly*, 20 How., 250.

Therefore, if by reason of Heath's Mexican citizenship, or by reason of his banishment from the country, his land became absolutely vested in him without condition, or if by the first section of the act of 1823 he, being a Catholic, and in a foreign country, was entitled to hold property, then in these events Heath or his heirs did not lose any of their rights to property in Mexico by reason of being in the United States. In such event they could have lived there enjoying same privileges as Mexican citizens, and could only have been deprived of their rights by proper proceedings of forfeiture.

Authorities cited above.

Heath became a Mexican citizen by obtaining the grant to his land.

Foreigners shall be deemed Mexican's when they acquire real estate in the Republic, providing always, they do not manifest their resolution to preserve their nationality.

Fed. Con. Art. 30 Sec. 11.
Hamilton's Mexican Laws Art. 11 p. 3–20.

Heath clearly manifested his intention to denounce his nationality and to become a Mexican citizen in both his petitions of April 1823 and December 1822.

To make our title good, it is not essential that Heath was a Mexican citizen, but the fact that he was such a citizen, becomes important in the proper solution of some of the points in our case. The learned Counsel fully appreciating this, earnestly argue that Heath never became a citizen of Mexico, that his heirs being dom-

icilated in the United States and citizen there could take no title to real estate in Mexico. They virtually concede that if Heath was a Mexican, then the negative of their proposition would be true.

That Heath being a Mexican citizen and being banished, remained so, is settled.

U. S. v. *Reading*, 18 How., 8.
Ennis v. *Smith*, 14 How., 424.
Abington v. *N. Bridgewater*, 23 Pick., 170–7.

The learned Counsel in court below argued that the land granted having come into the United States by the Gadsden purchase, Heath having died prior thereto, in the United States his heirs could not inherit.

The gentlemen are mistaken as to the facts of this case relative to the treaty of Guadalupe Hidalgo and the Gadsden purchase. All our land north and east of the Rio Grande River, about two-thirds thereof, came into the United States under the first treaty.

At the time of our grant the lower boundary of New Mexico was different from what it is at present—it came to the Rio Grande near El Paso del Norte, then followed up the river north to above where our land is situated. The line between Mexico and the United States, established by the Gaudalupe Hidalgo treaty, commenced where the Rio Grande empties into the Gulf of Mexico, followed the middle of said river to a point north of the Heath grant, then ran west, etc., thus putting into the United States all of Heath's land east of the Rio Grande River. The remainder came in under the Gadsden purchase in 1853.

As to the land coming into the United States under the Gaudalupe treaty, their able argument upon the proposition, "but even if the concession to Heath had conferred a title upon him the land granted would have escheated to the government at his death," is entirely eliminated from the case. Heath died after the treaty of Gaudalupe Hidalgo, therefore the question is not as to the right of his heirs to inherit lands in Mexico, but in the United States. For this and other reasons we have shown their pleas, argument and authorities have no applicability whatever to the case.

NO ABANDONMENT.

There was no abandonment of the country such as would work a forfeiture of our property, and cause it to immediately revert to the mass of the public domain. To have effect abandonment must be voluntary, not involuntary. Abandonment is not presumed from mere absence, it is a question of intent. There can be no abandonment without an intent to abandon. Absence alone raises no necessary presumption of abandonment, for it may be shown to be constructive presence. Absence from the land under duress

constitutes no abandonment and can work no forfeiture. The government of Mexico was alone itself responsible for the prolonged absence of Heath from his grant, and was estopped by its acts from declaring any forfeiture on account of such absence. To have declared a forfeiture would have been taking advantage of its own wrong. What Mexico could not rightfully have done in the premises, its successor in dominion, the United States, can not rightfully do. To withhold a confirmation of the land is in effect to confiscate the property by reason of a fault of the grantor. The government having interfered can not claim against the grantee either estoppel or forfeiture.

Henshaw v. *Bissell*, 85 U. S., 255–271.
Boggs v. *Merced Mining Co.*, 14 Cal., 368,
And page 118 of argument.

"No absence, if it be constrained or involuntary, or by banishment, threat of arrest or imprisonment, could work a change of domicile, abandonment or loss of property. The court rightly ruled that to constitute an abandonment of the country, the act must be voluntary. This principle was settled in the case of *Hardy* v. *DeLeon*, 5 Tex., 211. Such a doctrine as that a party shall forfeit his right and title and suffer disfranchisement in consequence of an involuntary act, done by coercion and compulsion of the constituted authorities of his country, would be too revolting to the common sense of justice of mankind to find a place in a just or enlightened code. There certainly is nothing in the laws of this country which can sanction or countenance such a principle."

Hardy v. *DeLeon*, 5 Tex., 211–235–245.
Affirmed in *Wheeler* v. *Moody*, 9 Tex., 372–5.
White v. *Burnley*, 20 How., 235-249.

No alienage caused by fine or by operation of law in a division of an empire will work a forfeiture of rights to property.

Airhart v. *Massieu*, 98 U. S., 481.
Sabriego v. *White*, 30 Tex., 576–584.
Kilpatrick v. *Sisneros*, 23 Tex., 113.
U. S. v. *Vaca*, 59 U. S., 556.

In order to constitute an abandonment of an important right, there must be a clear and unequivocal and decisive act of the party, showing a determination not to have the benefit intended.

Morse v. *Anderson*, 59 Tenn., 290.
Bank v. *Bank*, 77 N. C., 186.

The grantors abandonment of an acquired right is not to be presumed.

Green v. *Forbes*, 2 La. Annual R., 957.

"If one is expelled or driven out from a country, it is true he cannot be presumed to have abandoned all hope of return, whatever length of time may have passed since he was driven from it."

Enis v. *Smith*, 14 How., 424.

Madaline Barrera left Texas in 1836, went to Matamores, where she remained until her death in 1842. Held,

"Whether it was her intention to return to the possession of her property or not is not made manifest or disproved by any testimony in the case. The presumption would be in favor of her purpose of returning."

Sabriego v. *White*, 30 Tex., 584.

In the case of *Stark* v. *Mather*, 1 Walker, 181, 12 Am. Dec., 553, the Court, speaking of an abandonment, said:

"The evidence should be very conclusive to produce a satisfactory conviction that a man who had at great expense migrated with a large family to this fertile country settled and improved a valuable property in it, had voluntarily and without any reasonable cause moving him thereto, abandoned and forsaken both."

In 1844 a grant was issued to Sebastian Nunez for the Ranche Orestrimba, no juridical possession given or approval of Departmental Assembly had. Until 1850 the claimant neither occupied, cultivated or took possession of the land, no effort on his part to perform the conditions appears to have been made, and the only explanation of the delay to be found in the evidence, is contained in a single *sentence of the deposition* of Francisco Perez Pucheco to the effect that there was no *security in putting cattle on the Ranche for several years after the grant.*

"Held that a claimant of even an imperfect or inchoate title had upon showing a performance *cy pres or an effort to perform conditions subsequent which had been frustrated by unforeseen obstacles, an equitable right to a confirmation.* 2d.—Title could be divested only by proceedings by way of denouncement, under the former government, and if no denouncement had taken place, it was not deemed competent for the courts to inquire into and declare forfeitures, which might have occurred under the Mexican government. But assuming, as I am bound to do, that the grantee acquired a vested interest I have not felt authorized to say *that the circumstances show that he voluntarily abandoned, or surrendered his rights during the existence of the former government.* What circumstances the Supreme Court may hereafter regard as authorizing the presumption of abandonment we cannot now say but it has seemed to me that they should be *strong and unequivocal before we can declare that a right of property once vested in a grantee of the former government has been forfeited or lost by an abandonment.*

Sebastian Nunez v. *U. S. Hoffman, 191-3-4-6.*

In the case of *Antonio Maria Pico* v. *U. S.*, Hoffman, 142, it is held:

1st. A grant to an officer for meritorious service stands no better than any other grant under the colonization laws. 2d. The important and sole question is *whether anything done or omitted to be done by the grantee during the existence of the Mexican government, forfeits the interests he has acquired and revested it in the government.* Such forfeitures could only have been incurred by unreasonable delay or *want of effort on his part to fulfill the conditions and*

such as to raise the presumption that he had abandoned his claim. It being shown in this case that the delay arose from obstacles which may be regarded as insuperable, that it was not unreasonable but probably unavoidable, no presumption of abandonment can arise and the title not having been forfeited and revested in the government, remained at the time the sovereignty passed to the United States, vested in the grantee and the United States are bound in good faith to uphold and protect it. (17 How., 557.)"

New v. *U. S., Hoffman*, 162.

In a case of *Hardy* v. *DeLeon*, 5 Tex., 211-244, it was proven: that the infant plaintiffs, were children of DeLeon, who was a citizen of Texas on and before the Declaration of Independence. *In June of that year DeLeon and family were sent by the military authorities of the Republic of Louisiana;* that the mother of plaintiff died, the father taking the children to their grandmother in Mexico went back to Victoria, his former residence in Texas, to make arrangements to send for his children in Mexico. When in 1838, on his way to Mexico, he was killed. The court was asked to instruct the jury that DeLeon had abandoned the country and therefore lost his property; that plaintiffs could not recover, their father dying out of the country. Held:

"There was no evidence, which under any construction that the court might have given, could have warranted the jury in finding the fact of abandonment. To have held the removal of the ancestor of the plaintiff from his country and home *without his consent and against his will* to amount to evidence of the abandonment by him of his country would have been to sanction an utter perversion of facts and a total disregard of the truth and justice of the case. *To constitute the abandonment of one's country, there must be the concurrence of the act and will.* The ground on which it is proposed to *disfranchise the party and to divest his title to his property ought to be clearly and conclusively established.*"

In *Glenn* v. *The U. S.*, 13 Howard, 259, it is held that a threat of fine and imprisonment is a prohibition sufficient to excuse settlement and cultivation of land.

Hinderkoper v. *Douglass*, 4 Dallas, 391.
Commonwealth v. *Coxe*, 4 Dallas, 170.

The case of *White* v. *Burnley*, 20 How., 235, was a controversy over a Mexican land grant in Texas. It was claimed that the title was *ipso facto* forfeited by voluntary abandonment. It is direct in point.

Soon after the grant was issued Manso, the grantee, left Texas and went to Louisiana, where he resided from the fall of 1834 up to the time when he conveyed his land in April, 1836. He took no part in the revolutionary movement, but quietly left the country. *Manso was a Spaniard and he left because all Spaniards were ordered to leave the country.* It was insisted that his removal was an abandonment of the country and a forfeiture of his

land according to colonization laws Coahuila and Texas, and the court was asked to so instruct the jury, which request was refused, the court saying:

"If the jury, believing from the evidence, that Manso was forced to leave the country by the public authorities, on account of his being a Gauchapin and his doing so was not voluntary, it was no abandonment of the country within the meaning of the colonization laws, and did not divest his right to his land.

That the burden of proof is on the defendant, to show a final and complete abandonment of Mexico, prior to the second of March, 1836, on the part of Manso, in order that an *ipso facto* forfeiture of his land under the colonization laws should be made out, and the facts on which it is sought to disfranchise a party, and to divest his title to property ought to be clearly and conclusively established."

Upon appeal, Supreme Court said:

"The evidence did not warrant any charge from the Court on the ground of abandonment of the country by Manso. The case of *Hardy* v. *DeLeon* (5 Texas R.) is conclusive on this ground of defense. To hold otherwise, would violate the entire doctrine laid down in the case of *McMullen* v. *Hodge*, (5 Texas R.) There must be *some* evidence on which a charge to the jury is founded, otherwise it cannot be lawfully given. As there was no evidence from which an abandonment could be found by the jury, an instruction on the subject could only mislead. (*Chirac et al.* v. *Reinecka*, 2 Pet., 249.")

White v. *Burnly*, 20 How., page 249.

Applying this law to our facts, the abandonment alleged by the defendants, is explained, excused and justified and by competent and legal testimony it is shown that Heath was against his will wrongfully driven out of Mexico, that his title is legal and valid, and should therefore be confirmed.

NO FORFEITURE OCCURRED OR WAS EVER DECLARED.

There can be no claim of forfeiture upon conditions precedent in our case. What was required of Dr. Heath was to be done after possession was given. It was therefore a condition subsequent. There is no condition whatever to be found in our title papers. But in section 23 of the act of 1823, it is provided that if the colonist does not within two years from date of concession cultivate his land, the rights of property shall be considered as renounced, etc. The colonist then took a title in fee upon conditions.

"The fee vested at once, subject to divesture should there be a failure to perform the acts and to comply with the conditions specified; and this was a condition subsequent, not a condition precedent. It is well settled that if the act required does not necessarily provide the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the par-

ties that the estate shall vest and the grantee perform the act after taking possession then the condition is subsequent."

Clinton v. *Washburn*, 46 N. W. R., 555, 556.
2 Wash. Real Property, 7, and authorities cited.
4 Kent, 125.
Wheeler v. *City of Chicago*, 68 Fed., 528.

In Arrendondo's case, 6 Peters, 691, the grant was upon similar conditions of cultivation, establishment, etc., and on p. 745 the court says:

"We now consider the conditions upon which the grant was made. According to the rules and laws by which we are directed to try this case, there can be no doubt that they are subsequent. The grant is in full property in fee, an interest vested on its execution which could only be divested by the breach or non-performance of the conditions, which were that the grantees should establish on the land two hundred Spanish families, together with the requisites pointed out, and which shall be pointed by the superintendency, and begin the establishment within three years from the date of the grant."

In the case of *Fremont* v. *The U. S.*, 17 How., 541, one of the conditions was: "he shall build a house within one year, and it shall be inhabited." The court said:

"It has conditions attached to it, but these are conditions subsequent. Conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates, and the rigorous execution of them is a *summum jus*, and in many cases hardly reconcilable with conscience. A court of equity will never lend its aid to divest an estate for breach of a condition subsequent."

Kent's v. *Commentaries*, 130.
Clinton v. *Washburn*, 46 N. M., 555, 6.
Curtis v. *Board of Co. Comm.*, 23 Pac., 98.

And it has been suggested by the Supreme Court of the United States that doubt existed whether a court was authorized to give effect to a condition of forfeiture, when the land had been legally granted.

McMicken v. *U. S.*, 97 U. S., 216.
U. S. v. *Sibbold*, 10 Peters, 313.

Under the laws of Mexico such conditions were waived:

"After proprietorship conditions were exempted."

White's Recop. White v. *Holliday*, 11 Tex., 615.

Sec. 2481, page 634, Hall's Mexican Law.—Contracts legally made shall be punctually fulfilled, and they cannot be revoked, nor altered, except by the mutual consent of the contracting parties, save the exceptions in law.

Sec. 2868, page 681.—A donation is irrevocable from the time the donee accepts it, and the acceptance is made known to the donor.

Sec. 1138, page 326, Hall's Mexican Law, provides that denouncement shall be made before the departmental government (gobernacio) directly or through the medium of the respective employes in each state, and the denouncer was to receive one-quarter of the land.

"The executive shall cause the contracts that are not carried into effect in the time stipulated to be published, that the respective lands may be understood to have become vacant and open to colonization."

Art. 11, Decree 128, of Coahuila-Texas.
Early Laws of Texas, p. 79, Sec. 11.

This law of 1823 in itself provided how and when lands could be forfeited. We submit that we could be deprived of our title in no other way. When a statute declares a penalty or a remedy, the punishment or the remedy can be only that which the statute prescribes.

Farmers Nat. Bank v. *Dearing*, 91 U. S., 29.
Stafford v. *Ingersoll*, 3 Hill, 29-35.
First Nat. Bank v. *Lamb*, 57 Barb., 499.
Gonzales v. *Ross*, 120 U. S., 605-625.

The divesture of title by government can only be accomplished in the mode authorized by law.

Doswell v. *DeLa Lanza*, 20 How., 34.
Cook v. *Fisher*, 75 Fed., 771.

Art. 23 provided that if our land was not cultivated within two years, "in which case the ayuntamiento might grant to another," while Art. 11 provided that in order to "prevent accumulation of lands in large portions, lands *not cultivated* were to be divided up and sold, *indemnifying the proprietors for the just price of such lands, to be fixed by appraisers.*"

We submit:

1st. The facts to make a forfeiture did not exist.

2nd. No authority ever found there was a forfeiture.

3rd. A re-grant by the governor and not by the ayuntamiento without a hearing or judgment can not be held to be a forfeiture.

4th. Heath's possession and ownership could not be destroyed for want of cultivation without some legal proceedings of divesture and compensation.

Our case comes within the ruling of the Supreme Court of the U. S. in case of *Brownville* v. *Cavazos*, 100 U. S., 138, where it is held the constitution of Tamaulipis having provided that land could not be expropriated or divested without previous compensation fixed by appraisers appointed by the state and the party in interest, that property could be forfeited only on appointment of appraisers and payment of compensation.

There is a rule of Spanish and Mexican law that no one can be deprived of his property without previous inquiry as to the existence of a fact which may, when properly ascertained, deprive him of his right.

White's Recop., 942 *Id.*, 85.
Hancock v. *McKinney*, 7 Tex., 384–435.

That the ascertainment of the facts necessary to make a forfeiture must be made, is clearly sustained by the act of 1823 and

the authorities. Sec. 23, after stating what is to work a forfeiture, says: "In which case the respective ayuntamientos can grant it to another;" contemplates the necessity of first ascertaining if there was such a "case," namely: failure to cultivate within two years. This fact must have been ascertained by some competent authority before any legal forfeiture could be declared.

"*The issue of a subsequent grant, even after the usual reference and report that the land was vacant, did not have the effect of a denouncement. There must also be an adjudication on the previous grant.*"

Jones v. *Garza*, 11 Tex., 185.
Sabariego v. *Maverick*, 124 U. S., 261-291.

The ayuntamiento was the proper authority to recall titles where the conditions had not been performed. (*Hollman* v. *Peebles*, 1 Tex., 707; Col. Law of 1825, Art. 25.) And in cases of abandonment of the country as being similar. (Rule 26, 2 Partidas, 1,248; 1 Febrero Mex., 73, 74, Av. 2.

"The respective political authority to whom was entrusted the power, upon abandonment of the country or non-performance of other conditions, to declare the forfeiture of the lands, did declare the forfeiture and nullity of the grant to McCormick, under which the defendant claims, and the land was regranted as being entirely vacant. The title was thus virtually recalled and canceled or annulled, and was henceforth to be regarded as though it never had an existence. (*Holliman* v. *Peebles*, 1 Tex., 691.) And this was by the judgment of a tribunal whose proceedings were made a matter of record and of public notoriety at the time, and have become a part of the history of the land titles of this country under the law of colonization."

Marsh v. *Weir*, 21 Tex., 111.

"There is no doubt that in practice under the Spanish law, when grants of land were made upon conditions, if the conditions were not performed, any one might denounce them, prove the forfeiture and apply and have the land granted to himself. But then it developed upon the party denouncing to prove the forfeiture. (2 White, p. 218, Sec. 9.) And if it be conceded that the plaintiff had the right to institute this proceeding, in analogy to the practice under the Spanish law for the purpose of having this forfeiture adjudged for the reason of non-performance of conditions, *nothing can be more perfectly clear than that it devolved on him to prove the facts in which the forfeiture consisted. A contrary doctrine would be repugnant to the plainest principles of justice and common right. We can not consent to the idea that any man who may have an unlocated land certificate may by locating it upon land in which the title is in another, and alleging that the other has forfeited his right by non-performance of conditions subsequent, or in any other manner, compel the owner to come forward and prove the negative, that he has not so forfeited his right.* (7 Tex., 384.) *Titles issued to colonists were of entirely different character from those concessions issued by the Spanish authorities in Florida, and afterwards pronounced inchoate by the Supreme Court of the United States. Under these laws the title of possession was a final title.*"

Hancock v. *McKinney*, 7 Tex., 384.

"Titles are valid until the state by some proper proceedings in the matter of office found has declared a forfeiture."

Hanrick v. *Patrick*, 119 U. S., 169.

This is the rule whenever the laws and statutes of Mexico are to be construed.

"By civil law as well as by the common law, the king cannot take upon himself the possession of an estate said to have escheated until the fact is judicially ascertained by a proceeding in the nature of an inquest of office, and in this there is a difference from a forfeiture for want of the performance of conditions precedent, for in the latter the conditions never having been performed, the title has not vested. An alien may hold real estate against every one, and even againt the government until office found. 3 Black., 259; 13 Wend., 566; 3 Wheat., 553; Escriche, Partidos Hispano Mexicanos, Vol. 11, 696; Sala Mexicano, Vol. 11, 240; *Ramirez* v. *Kent*, 2 Cal., 559. So that on the death of L., his mother, by natural justice, became entitled to the possession and could not be disturbed until office found. No such judicial proceedings was instituted and no act of the Mexican government was done to divest her defeasible estate. While things remained in this condition, the treaty was ratified and California became a territory of the United States. With a change of flags there was a change of political laws; the United States after the treaty became vested with no authority to prosecute any claim for a forfeiture that had occurred in California to the Mexican government."

The People v. *Folsom*, 5 Cal., 379.
Minturn v. *Brower*, 24 Cal. 644–664.
De Merle v. *Mathews.*, 26 Cal., 456–478.
Escriche, title Denuncia.

It will not be denied that under the foregoing decisions an alien may purchase and hold real estate, and to say he might do this and still be disqualified from taking by inheritance, would involve a legal solecism. (5 Cal. 381.)

Speaking of titles under the law of 1824, the court said:

"Under Mexico it might have been submitted to the territorial assembly, reported against, *forwarded to the supreme government, and been there rejected; or in case the conditions of the regulations, as to cultivation or occupation of the land, had not been complied with, it might have been denounced, and upon proper investigation the estate declared forfeited. But until one or the other of these provisions had taken place, the title continued in Sutter unimpaired. Neither of these proceedings were had under the Mexican government, and therefore at the date of the cession of California to the United States this title remained in full force.*"

Ferris v. *Coover*, 10 Cal., 619.

A title can not be destroyed by a simple *ipse dixit* of the constitution, any more than by a legislative act. Some proof at least must be given in a judicial proceeding to show that a title was forfeited, if that be a fact, before it can be declared null and void.

Gonzales v. *Ross*, 120 U. S., 629.

"The grant being valid is within the protection of the treaty of Guadulupe Hidalgo and the constitution of the United States; and it is not competent for the state to nullify it, as a stale claim, without judicial inquiry or to prohibit its use as evidence."

Lerma v. *Stevenson*, 40 Fed., 356-9, and many authorities cited.

This, by the way, was said of a grant made under the law of 1823 by the same town council that executed our grant. See page 47 of this argument.

The principle which we argue is the universal doctrine settled by all the courts, wherever the questions have arisen. The Supreme Court of Mississippi in two cases very ably and learnedly discuss the principle for which we contend. The opinions are so direct in point, we will quote at length:

"The report of the Surveyor of the Spanish government stating *the land to be vacant* and the allegation of that fact in a Spanish grant *does not amount to a confiscation or a revocation of a prior grant of the same land.*

"A revocation of a grant, by the effort of capricious tyranny, ought to be disregarded. The Spanish order of survey confirmed by the United States constitute a legal title, independent of a patent. Congress cannot impair the vested rights of individuals, much less could their subordinate officers impair those rights."

Winn v. *Cole's Heirs*, 1 Walker, 119.

In 1791 Robert Stark, plaintiff's ancestor, obtained from the governor-general of the province of Louisiana an order of survey for 2,000 acres: the land was surveyed and returned by W. Dunbar, deputy surveyor. Plaintiff's petition alleged that his ancestor was put into possession and remained so for several years, complying with all the conditions of concession, by paying the fees, cultivating several crops, etc., that his said ancestor, not being satisfied with his situation proposed to Governor Gayozo to relinquish said tract of land on express condition that he should receive in exchange another one of equal value which he might select. That said Governor, without complying with said conditions, from a personal dislike to their said ancestor, in 1794 deeded said tract of land to one James Mather, the defendant's ancestor, who took possession of the same, together with a crop of corn, etc., against the will of plaintiff's predecessor in title. That Mather's title was obtained through the fraudulent representations of W. Dunbar and other officers of the Spanish government. The defendant's answer admitted an order of survey and possession of plaintiff's ancestor, denied extensive improvements, etc., alleging that he heard that R. Stark had vacated said land and that he, Mather, had rightfully obtained a title to the same. Further alleging that R. Stark never made any application for other lands, but abandoned the same, leaving the country, not returning until after a change of government. That said land had been in continued possession of defendant for over twenty years, etc. The question of abandonment was found in favor of the plaintiff. The Supreme Court, approving the finding of the jury, said:

"The evidence should be very conclusive to produce a satisfactory conviction that a man who had at great expense emigrated with a large family to this fertile country and settled and improved a valuable land property in it had voluntarily and without any reasonable cause moving him thereto, abandoned and forsaken both."

The court further held: *If the government by mere act of power revokes a grant and gives title to another the courts will respect the title of the first grantee.*

When A received a grant of land from the Spanish government which was revoked by an arbitrary act of power, and the land granted to B, and A driven from the country, and B's title is confirmed by the Board of Commissioners, B shall be decreed to hold as trustee for A.

In the case of *George Winn* v. *Cole's Heirs*, decided at the adjourned January term, 1823, this court held:

"That the possessory order in favor of James Cole to the premises in question, dated sixth of June, 1795, by which said Cole was put into possession, vested in him such a right as could only be defeated by his own act of alienation, voluntary abandonment, or by such an entire failure of the conditions of the grant, or by some act against the government, which could justify in them its confiscation."

In regard to the first, there is not in this case, as there was not in that case, any pretence set up. In that case, it was not pretended that there was, and in this the jury have expressly found that there was not a voluntary abandonment, and in neither case is it alleged that there were any rebellious or treasonable practices on the part of the grantees to justify the Spanish government in the revocation or confiscation of its grant or order of possession.

In the absence of a record of a judicial or or official revocation or confiscation of the grant to R. Stark, the ancestor of complainants, for good causes moving the government thereto such as before stated, viz., failure to fulfill the conditions of the grant, or some act of treasonable or rebellious practices against the government, in case where it is not pretended there was an alienation of right, and the jury has expressly found that there was not a voluntary abandonment of it, the re-granting of the subject-matter of such right to another person, shall be deemed the result of mistake, or of the second grantee had due notice of the prior claim, the procurement of false representations and fraudulent practices on his part, or the effect of lawless power in the governor, unsupported by reason or justice, and not to be upheld by a decree of that tribunal, which hath no help for fraud or oppression; whatever, therefore, may have produced another grant of the same premises, before the first grantee had been legally divested, such a subsequent grant can convey no right or property in the premises to the prejudice of the subsisting rights of the first grantee, and he who occupies the controverted premises by virtue of such a subsequent grant, though he be ushered in under the panoply of a

full and complete legal title, and be supported in his possession by the strong arm of power, shall nevertheless, after that domination ceases, be decreed by courts exempted from its influence, to hold and possess as trustee for him so unjustly evicted. If the possession of James Mather was, as it certainly was in our estimation, virtually the possession of Robert Stark, the ancestor, then the absence of the latter, on the twenty-seventh day of October, 1795, shall not defeat his claim, we are inclined to think that such would be our opinion even in a case where the contest had been wholly between two citizens, where the weaker with the better right was overborne by the stronger, and under such discouragements, voluntarily left the country, *but surely in a case where a man flies from the strong arm of power, he shall not forfeit any right thereby.*

Stark v. *Mather*, 1 Walker, 181; 12 Am. Dec., 553.

We submit that there was no forfeiture of our title by reason of subsequent re-grants of a portion of it by the Mexican government. Under the Mexican laws and statutes, re-grant is not the evidence of forfeiture; there must have been a judgment of a proper court as to the grounds of forfeiture. See authorities above.

We have not found a single case that conflicts with the long line of authorities we have given, or denies the proposition that a Mexican grant when once vested, could be forfeited without judicial inquiry. There are a few cases which hold that a re-grant of the government is equivalent to office found, but the inquiry is left to the judiciary, as to whether the forfeiture has been legally made.

Farnsworth v. *M. & P. R. Co.*, 92 U. S., 49.
Schulenberg v. *Harriman*, 21 Wall., 44.
McMecken v. *U. S.*, 97 U. S., 204–217.

We have no controversy with these decisions. They do not tend to deny the argument we have made, or to overrule the cases we rely upon. Under the rule they announce, the validity of our grant is still open to judicial inquiry, that while the office found might not be necessary, yet it was the safest, best and only way to avoid uncertainty in titles and consequent litigation. That as forfeiture must be declared by office found or by some equivalent way, re-entry and re-sale for breach of the conditions, if attempted by a mode other than by judicial proceedings, the title is left open to legal contestation. Re-grants can not effect our rights. If the land belonged to us, these grants were void, and there being no estoppel the whole matter is open for controversy, but not so if there had been office found.

Farnsworth v. *M. & P. R. Co.*, 92 U. S., 66–7.

In the case of *At. & P. R. Co.* v. *Mingus*, 17 Sup. Ct. R., 353, the court said:

"But while we think the practice of forfeiture by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that the power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government nor with the constitutional rights of the grantee, to hold that the government, by an arbitrary act, might divest the latter of his title when there had been no breach of the conditions, subsequent *or when the government itself had been manifestly in default in the performauce of its stipulations. The inquiry in each case is a judicial one—whether there has been upon either side a failure to perform; and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture.*"

This doctrine that a regrant was a forfeiture has never been applied to grants made under Mexican laws.

In *Hornsby* v. *U. S.*, 77 U. S., 240, Justice Field said:

"But independent of the considerations stated, it is a sufficient answer to the objections to say, *that a mere neglect to comply with the conditions did not of itself work a forfeiture of the grantee's rights under the Mexican laws. The neglect of a grantee to apply for or take possession, if unreasonably prolonged, only left the land open to denouncement by other parties. The interest of a grantee could not be divested under the Mexican law, any more than at the common law, upon mere allegations or surmises. Some formal and regular proceedings were required to effect such divesture, and under the Mexican law they had their inception in what is termed a denouncement by a party desirous of obtaining the land. An investigation then followed, whether or not the conditions had been complied with or so disregarded as to justify a decree of forfeiture. Without such inquisition and decree, the title did not revert to the government, nor was the land subject to be re-granted. There having been no forfeiture of the grantee's interest in the present case, nor any such disregard of the conditions annexed to their grant as to have justified a forfeiture, the claimants under the grant are entitled to a confirmation.*"

Affirmed in *Henshaw* v. *Bissell*, 85 U. S., 262-3, the court saying:

"The estate granted was not afterwards liable to be divested except by regular proceedings of denouncement. The power of the governor over it had ceased. He could neither revoke the grant nor impair the interest of the grantee by any attempted transfer to others."

This Hornsby case is very direct in point. That our grant was a fee simple title *in presenti*, was definitely fixed, located and determined, and therefore not a float, and that such a title could not be annulled under Mexican laws except by proper proceedings of forfeiture—these and other questions involved in our case are all here clearly settled.

Therefore, we say, there having been no forfeiture of the grantee's interest in our case, nor any such disregarded of the conditions annexed to the grant as to have justified a forfeiture, under the circumstances and facts presented, the law having been repealed and the grantor having excused, waived, hindered, and prevented the performance of conditions subsequent, the claimants under the grant are entitled to a confirmation.

SIXTH POINT.

The equities of this case are all with the plaintiffs. Their predecessor in title having fulfilled his part of the contract by expending money and trying to occupy and cultivate the land granted, but having been prevented in this by the revolution which overthrew Iturbide, the Emperor, his title became absolute and unconditional and was not affected by the establishment of any new and dependent form of government, or by any subsequent grants of this land, they having been made without jurisdiction. The defendants, who occupy a portion of our land, are not innocent holders, they having previous knowledge of our title, recorded grant and public survey.

We submit that the pretended right set up by the defendants who claim a portion of the land covered by our grant is void in law and equity. Our grant being first in time is first in right, and it must be held that they took subject to us, and that the land having been granted to Heath in 1823, there was no title subsequently in the governments of Mexico and the United States to grant to the defendants.

While it might be true this court under an act of March 3, 1891, may not have jurisdiction to determine and settle absolutely the controversy between plaintiffs and defendants, the parties who are claiming a portion of our grant, as to who has the older and better right or title, yet defendants having been permitted to come in and defend, by trying to defeat our grant, the same principles, points and contentions arise before the court as would arise in another court after the confirmation of our grant. If our title is valid in law or equity, perfect or imperfect, choate or inchoate, then the fact that the defendants pretend to hold a part of this land under a subsequent grant should not be considered in helping to defeat our title. If our grant is good and valid, then the defendants have no title, so virtually the same questions arise as if the plaintiffs and defendants were claiming under separate patents. The answer of the defendants is, that a portion of the land belongs to them and not to the plaintiffs.

"In an action of ejectment, when both parties claim the premises in controversy under patents of the United States issued before a confirmation of grants of land in California made by a former Mexican government, both of which patents cover the premises, the inquiry of the court must extend to

the character of the original grants, and the controversy can only be settled by determining which of these two gave the better rights to the premises."

Henshaw vs. *Bissell*, 18 Wall., 255.
Cameron v. *U. S.*, 301.

The case of *Harrison* v *Ulrich*, 39 Fed., 656, is very interesting and instructive on many of the points in our case.

Patents had been issued to both claimants by the government of the United States. Both claimed by old concessions and possessions at certain times, but neither had any title papers or record until May 22, 1834. Governor Figueroa made a final grant to Catarina Ruis, and other heirs of Manuel Nieto, the plaintiff's predecessor. The defendants claimed through a petition, dated Sept. 11, 1801, to Aurrillagas, governor of the territory, and possession; but this application was never acted definitely upon. Subsequently the board of commissioners treated the concession as a grant, or at least as an equitable right to it, and confirmed the claim July 10, 1855; a patent was issued by the United States December 31, 1883. Patent to plaintiff was issued August 27, 1877, subsequent to confirmation of plaintiff's title by board of commissioners. Both having patents, the question was which had the older and better right. Held:

1st. That although the grant to Catarina Ruis was not approved by the departmental assembly, but did invest her with full ownership and title to the fee in the land measured off in the proceedings given her official possession, her title could not be affected by any subsequent patent to another.

2d. That if the concession to Manuel Rodrigues, whom the defendant represented, had passed the title to him in 1801, then the governor would have had no power to grant the title to the heirs of Nieto; and to subject the grant to the possible forfeiture for breach of conditions annexed.

3d. That the plaintiff's title being the older and better one —the first made by the Mexican government, their rights should be sustained and respected.

Lands conveyed by a Mexican grant are not public lands, but are reserved from other grants and patents.

The title to a Spanish or a Mexican claim is such that the right of private property cannot be impaired by a change of sovereignty. These lands are not included in the public lands, " and until such claims are finally decided to be invalid, they are not restored to the body of public lands to be granted. *This exclusion does not depend upon the validity of the claim or its final establishment, but upon the fact that there exists a claim of right under the Mexican government which was yet undetermined.*"

Newhall v. *Sanger*, 92 U. S., 761.
Wright v. *Roseberry*, 121 U. S., 488–519, 520.
Doolan v. *Carr*, 125 U. S., 618.
U. S. v. *McLaughlin*, 127 U. S., 428.
Leavenworth L. & G. R. Co. v. *U. S.*, 92 U. S., 733.

Kansas R. R. Co. v. *Dunmeyer*, 113 U. S., 629.
Bardon v. *N. P. R. Co.*, 145 U. S., 535-543-5.
Knight v. *U. S. L. Ass.*, 142 U. S., 161-176.
Shanklin v. *McNamara*, 26 Pacf., 345.

Not only by virtue of the laws of Mexico, the treaty and decisions quoted, must our title be confirmed, but by reason of the Act of Congress of July 22d, 1854, our grant was protected, held *sub judices*, until action by surveyor-general and Congress; because the 8th section of said Act expressly declares: that "until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

An Act to establish the office of surveyor-general of New Mexico, July 22d, 1854, Land Laws of the United States, 1882, p. 942,—10 St. L., 308, Sec. 8:

"That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and for this purpose may issue notices, summon witnesses, administer oaths, and do and perform all necessary acts in the premises. He shall make a full report on all such claims as originated before the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with the decision as to the validity or invalidity of each of the same, under laws, usages and customs of the country before its cession to the United States, and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior, which report shall be laid before Congress for such action thereon as may be just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of 1848 between the United States and Mexico; and until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

In *Cameron* v. *U. S.*, 148 U. S., 309, it is held that when land has once been legally appropriated for any purpose it became from that moment severed from the mass of public lands, and not within the meaning of that term as used in the acts of Congress respecting the disposition of public lands. The court also held:

"And in *Newhall* v. *Sanger*, 92 U. S., 761, lands within the boundaries of an alleged Mexican or Spanish grant, which were *sub judice* at the time the Secretary of the Interior ordered a withdrawal of the lands along the road of a certain railroad, were held not to be embraced in a grant to the company. Speaking of such claims, it was said by Mr. Justice Davis, 'that claims, whether grounded upon an inchoate or a perfected title, were to be ascer-

tained and adequately protected. This duty enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until the opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Mexican or Spanish claim, until it was barred by lapse of time or rejected.' It was urged in that case that the reservation could only be of lands 'lawfully' claimed, but it was said expressly that there was no authority to import the word 'lawful' into the statute in order to change its meaning, and that the act in question expressly excluded from pre-emption and sale all lands covered by any foreign grant or title."

A patent or grant approved subject to the claim of others who may have an interest in it, is only a quit claim releasing such interest as the United States possesses in the land conveyed by the original grant. It conveys nothing which the government at the time had not the power to grant, and whether or not said land was previously granted is open to investigation upon collateral attack.

White v. *Cannon*, 6 Wall., 443.
Teschemacher v. *Thompson*, 18 Cal., 11.
Smelting Co. v. *Kent*, 104 U. S., 641.
Wright v. *Roseberry*, 121 U. S., 519.
Miller v. *Dale*, 92 U. S., 473.

A *bona fide* purchaser under a quit claim deed assumes the risk of title and takes only what his vendor can lawfully convey and is not regarded as a purchaser without notice, entitled to the benefits of the registration, even though he had no actual notice.

Webb, Sect. 163.
Thorn v. *Newsom*, 64 Texas, 161.
Butler v. *Barkley*, 25 N. W. R., 747.

If title by patent is subject to a former right, the former right must prevail. In such case the patentee accepts the title of the United States with knowledge that another claim exists and that he does not intend to deny or destroy it, nor to defend his title against it.

Dredge v. *Forsythe*, 2 Black, 568.
Mehan v. *Forsythe*, 24 How., 175.
Byran v. *Forsythe*, 19 How., 334.

Our rights could not be and have not been effected by the confirmation or patents issued for any part of the land covered by our grant. It was not the intention of the government of the United States to do so. The confirmation of the claims of Juan Antonio Garcia and Hugh Stevenson as well as the patents to all other defendants contains these words: "That the confirmation and patents shall only be construed as quit claims or relinquish-

ments on the part of the United States and shall not affect the adverse rights of any other person or persons whomsoever."

Land Laws of U. S., 1882, p. 944–5.

Here our rights are expressly reserved, "and it is to be presumed that Congress thus acting, had examined into the facts of the case and were fully advised that there was a conflicting claim set up to this land by third persons, and inserted this proviso for the express purpose of preventing the courts from giving this confirmation act such a construction, as should in any manner, affect the rights of third persons, whatever they might be."

Hamilton v. *Avery*, 20 Tex., 612–632-3.
Howard v. *Perry*, 7 Tex., 262.
Hart v. *Gibbons*, 14 Tex., 215.

An important question arises—it is as to the effect upon our right under Sect. 14 of the Act of 1891. It is therein provided "that if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person *shall remain valid, etc.*"

We are informed that in several cases decrees of United States Land Court have been entered, deducting lands granted to others, giving claimant of Mexican grant $1.25 per acre for the land taken, payable by the United States, as provided in the Act of 1891. The question has not yet been decided by this court.

We are further informed that two members of that Honorable Court have dissented from this ruling, upon the ground that this part of the act is unconstitutional, for the reason it is taking property without "due process of law." That while the majority of the court do not deny this proposition, yet hold that the act of March 3, 1891, is a limitation upon the powers of the court to act, and that all the authority they can exercise, must be within the prescribed limits of the act itself. We insist that this rule has no applicability to our case, for the reason there has been no sale or transfer of any portion of the Heath grant, that could possibly effect our rights. We have shown that it was expressly provided that the confirmation of that portion of this land transferred, should only be construed as a quit-claim or relinquishment on the part of the United States, and *should not effect the rights of any other persons whomsoever.* Such was the title taken by the parties to whom conveyances were made. The act of 1891 does not pretend to enlarge their rights. Its language is, "such title from the United States to such other person *shall remain valid,*" not be made valid, but remain as it was. We have shown that this title was subject to ours if we have a valid one, that the receiver of the same could not deny or destroy our title, and in the language of the Supreme Court of Texas, in a similar case, this proviso was inserted by Congress in the confirmation for the express purpose of

preventing the courts from giving this confirmatory act such a construction as should in any manner affect our rights, or the rights of any person whomsoever.

Hamilton v. *Avery*, 20 Tex., 612–632–3.

That the effect of such a deed or patent is just what we have claimed, is clearly supported by the authorities quoted. We fail to find anything in the law of 1891, that requires this court, to violate the inalienable rights of property secured to us by the constitution of the United States, the treaty of Guadalupe Hidalgo, as well as the 22d section of the law of 1823 which provided that "our concession constituted an inviolable law for the right of property and legal ownership." With our interpretation, these and the law of 1891 can stand together. To destroy these sacred rights and guarantees, the mandate should be very strong.

That the taking of any part of our grant at the arbitrary price of $1.25 per acre would be depriving us of our property without due process of law, and therefore unconstitutional and void, scarcely needs any citation of authorities.

3 Am. & Eng. Ency. of Law, 714–758.
Weynehamer v. *People*, 13 N. Y., 327–8.
Texas Mex. Ry. Co. v. *Locke*, 12 S. W. R., 80.
Pumpelly v. *Green Bay Co.*, 13 Wall., 179.
Norman v. *Heist*, 5 Watts & Sergent, 193.
Cooley's Constitutional L., Sect. 351–7–8–393.
Gardner v. *Newburgh*, 2 Johns Ch., 162 and note.
Osborne v. *Hart*, 24 Wis., 91; 1 Am. R., 161.

The taking of our property contrary to our constitutional rights and vesting it in another, by virtue of the provisions, "such title to such other persons shall remain valid," is certainly a strained construction of these words as well as an open violation of the provision that said "transfer to such other persons should not affect our rights."

The point we argue has been settled by high authority. First—Under the act of July 22, 1854 (see page 193), the surveyor-general was to ascertain the origin, nature, character and extent of all Spanish and Mexican land claims and report same to Congress for final action; and until final action of Congress thereon, all lands covered thereby should be reserved from sale by the government. Therefore, all lands covered by Mexican grants being excepted from general sales, all attempted sales or patents issued on same are not only voidable but *absolutely void*, having been made contrary to law. It has been so held in a number of cases, under the Florida treaty in Missouri, Arkansas and Louisiana.

Stoddard v. *Chambers*, 2 How., 284–313–5–6–7.
Easton v. *Salisbury*, 21 How., 426–431–2.
Menard's Heirs v. *Massey*, 8 How., 293–307–8.
Bissell v. *Penrose*, 8 How., 317–331–8–9.

Mackey v. *Easton*, 19 Wall., 619–626–7–8–9–632–3.
Barry v. *Gamble*, 3 How., 31–53.
Carondelet v. *St. Louis*, 1 Black., 179–189.
Hot Springs cases, 92 U. S., 698.
U. S. v. *Carpenter*, 111 U. S., 347.
Kans. Pacf. Ry. Co. v. *Dunmeyer*, 113 U. S., 629–642–4.
Newhall v. *Sanger*, 92 U. S., 761.

SECOND—In accordance with this statute these attempted sales or confirmation of subsequent Mexican grants, were made subject to our claim by express words providing that,

"Confirmation should not effect the adverse rights of any other person whomsoever. As to us these sales are void and can be of no effect. The law of March 3, 1891, does not attempt to make valid a void sale—it only provides that a sale which is valid '*shall remain valid*'—not be made valid. It is evident sale here means a valid legal sale, and not a quit claim or relinquishment made as in our case reserving our rights by express statute. As to us the sale was absolutely and unconditionally void—in other words was no sale at all. This proposition has frequently been sustained by the Supreme Court of the United States in the cases of *Stoddard* v. *Chambers*, 2 How., 317, frequently reaffirmed in subsequent cases. The defendant in the court below claim the land under a New Madrid location which covered the land claimed by the plaintiff under a prior Spanish grant. The plaintiff's title had been confirmed by Congress under the act of 1836, with a provisal similar to that found in the law of 1891, 'That if it should be found that any tract had been previously located by any other person or persons under any law of the United States or surveyed or sold by the United States that act should confer no title over such lands in opposition to the rights acquired by such location or purchase.' It was contended that by virtue of this provisal the New Madrid title was the better. Held, 'That sale meant one made under and by virtue of law. That the holder of the New Madrid certificate had a right to locate it only on public lands which had been authorized to be sold but having been located on land claimed, a Spanish grant reserved from sale by act of Congress, said location and sale was utterly void." *The inquiry here is whether the defendant has any titles as against the plaintiff, and there seems to be no difficulty in answering the question that he has not. His location was made in lands not liable to be thus appropriated but expressly reserved. No title can be held valid which has been acquired against law, and such is the character of the defendant's title so far as it trenches on the plaintiff's.*"

Stoddard v. *Chambers*, 2 How., 284–316–7, reaffirmed in
Mills v. *Stoddard*, 8 How., 345–353–6–7–362–5–6.
Bryan v. *Shirleff*, 53 Tex., 440–484.
Barry v. *Gamble*, 3 How., 32–5.
Mackey v. *Easton*, 19 Wall., 619–626–8–9.
Menard's Heirs v. *Massey*, 8 How., 293–307–8.
Bissell v. *Penrose*, 8 How., 317–331–2.

Minn v. C Conn 29 Ark 571 - 8 S. 457
Shumard v. Fleming 29 Tex 408 Sup

Field v. *Seating*, 19 How., 332.
Kemble v. *Whesler*, 22 Tex., 77–85.
7 Tex., 441. 1 Tex., 721–730.

Here then a sale having been made reserving our rights and as to us, contrary to law, and therefore void was in fact no sale at all. Is it possible under these authorities for "proof" to be made "To the satisfaction of this Court," that "A sale or grant has been made by the United States" which is legally effectual to deprive us of our property or any part thereof. To do this you must decide contrary to the decisions that a "*Title can be held valid which has been acquired against law.*" But it may be suggested that Congress has so declared, and the Court must carry out the instructions of the superior powers. We deny this for the following reasons:

First—Conceding that Congress had the right—which we deny—to destroy vested rights by making valid what was void: To do this we insist that strong, direct, positive and unequivocal words must be used. It must have been provided that an illegal sale be made legal, that the sale which had been made so as "Not to affect the adverse rights of any person whomsoever" must have been made by direct words to destroy our rights. That this limitation was not taken off of their grant or the power of distinction of our grant given by the quit claim or relinquishment on the part of the United States in the simple provision that "Such title shall remain valid."

Second—This title as to us was void, and never could be made valid as against our rights, even by Congress itself.

Third—Our grant was a contract executed in writing and by possession and survey, and was therefore protected by treaty between the two nations. A statute annulling such a conveyance is unconstitutional, because it deprives us of our property without due process of law. Property can be taken for public use only after payment of compensation. It cannot be taken for private use upon any conditions; much less so without full compensation. Therefore legislative power is incompetent to annul our grant and grant the land to another, such law is void. Some authorities hold that the legislature may impair imperfect or incipient titles, but all rule that it cannot destroy a right which has once become acquired as valid in law or equity. It may provide that the owner of a title must comply with certain reasonable conditions, such as bringing suit in a certain time or under the penalty of forfeiture for neglect. This only effects the remedy, and is not unlawful. It might be that Congress may enact a law affecting a treaty with foreign nations, the same as it could repeal its own acts, but it cannot pass a law destroying vested rights, that would be unconstitutional.

U. S. v. *Arredondo*, 6 Peters, 737–8.
Fletcher v. *Peck*, 6 Cranch, 87.

Warren v. *Sleuman*, 5 Tex., 442.
Lewis v. *Mixon*, 11 Tex., 564–570–1.
See 1st and 2d point of Argument, pp. 67–105.
Wright v. *Hawkins*, 28 Tex., 452.
Sherwood v. *Fleming*, 25 Tex. Supplement 408–9.
Hamilton v. *Avery*, 20 Tex., 612.
Howard v *Perry*, 7 Tex., 259.
DeCordora v. *Galveston*, 4 Tex., 470.
Kimmell v. *Wheeler*, 22 Tex.. 77.
Bryan v. *Shirley*, 53 Tex., 440.

Congress has no constitutional power to settle or interfere with rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary.

Wilson v. *Wall*, 6 Wall., 89.
Holden v. *Joy*, 17 Wall., 211–247–250.

NOTICE, AND ABSOLUTE PROOF AND RECOGNITION OF OUR GRANT.

Our grant since 1823 has been kept continually on the records of the land office at Santa Fe, and reported by the surveyor-general as an unsettled claim. See schedule of documents relating to grants of lands by the Spanish and Mexican governments in the archives of the surveyor general of New Mexico.

No.	Archive No.	Year	Name	Nature of Document,	County
505	410.	1823	HEATH, JOHN G.	GRANT.	DONA ANA.

There has been no action of congress on this and many other similar claims until the passage of the act of March 3, 1891. The record of our title in Mexico and the filing of the copy thereof in the archives of Santa Fe, where, subsequently the general land office of the territory was located, fully met the requirements of all the laws and statutes on the subject. This gave notice to the government and all subsequent claimants of the grant, and they were bound to take notice of it.

Airhart v. *Massieu*, 8 Otto, 491–505.
U. S. v. *Vallego*, 1 Black., 541–555.
Bryne v. *Vagan*, 16 Tex., 392–399.
Guelbeau v. *Mays*, 15 Tex., 411.

The survey of the land into possession of which we were placed, being definitely marked and fixed with distinct lines and corners, both natural and artificial, stone monuments and natural points being used, can at this date be designated, traced and located—the initial point, the head of the Bracito acequia, the la cueva or cave near the Organ mountains, the south-east corner and other points on the survey are all well known. Of this the defendants and all the world were obliged to take notice.

When parties locate land with actual knowledge of a prior equity or under cirumstances which make it a duty to take notice,

they and their privies are bound by such equity. Such locations are fraudulent and cannot be benefited by a patent.

Airhart v. *Massieu*, 8 Otto, 505.
Magee v. *Chadron*, 30 Tex., 644–660.
1 Tex., 203; 7 Tex., 266; 14 Tex., 278; 22 Tex., 565.

As between two purchasers of the same land from the government, the latter is chargeable with notice of any facts appearing by the records of the land office at which he purchased, going to show the title or claim of the first purchaser.

Webb, on Record of Title, Sec. 135–152.
Schnee v. *Schnee*, 23 Wis., 377.
Minter v. *Crommelin*, 18 How., 87.

Index entries, even though no description of property is entered will be held as sufficient if it discloses enough to put a prudent examiner on inquiry a on such inquiry an adverse title would have been ascertained.

Wardvelle on Abstract of Title, p. 75, Sec. 11.

Ponce de Leon as a witness for Hugh Stevens testified, in 1849, to a grant having been made to Juan Gid for this land by Mexican government in 1823. See pages 56 to 59 of Argument, to which special attention of this court is invited.

See also evidence of Major Teel, page 132 of the record, and deposition of Gregoria Herreia and Price Cooper, pages 132 and 129.

The power of Congress relative to treaty obligations is absolute and supreme. The action of the government thereunder, and the rights which a perfect title ensures to its possessor, can not be impaired or defeated in any respect by the statute of limitation of the states.

The statute of limitation against Mexican claims, which needs confirmation, does not begin to run until patent is issued by the United States.

Henshaw v. *Bissell*, 85 U. S., 555–270.
Montgomery v. *Bevens*, 1 Sawyer, 680.
Gardiner v. *Miller*, 47 Cal., 570–575.
Doran v. *The Central Pacific R. R. Co.*, 24 Cal., 266.
Hagan v. *Spect*, 48 Cal., 406.
Galindo v. *Wittenmeyer*, 49 Cal., 12.
Emerin v. *Alvarado*, 64 Cal., 609.
Riverside L. & I. Co. v. *Jensen*, 66 Cal., 300.
Cleaves v. *Whitney*, 16 Pacf., 608.

The occupation of land derived from the United States before issue of a patent for a period prescribed by the statute of limita-

tion of the states, is not a bar to an action of ejectment for the possession of such land found upon the legal title subsequently conveyed by the patent.

Gibson v. *Chauteau*, 13 Wallace, 92, 99, 100–4.
King v. *Thomas*, 12 Pacf., 865.
Gardiner v. *Miller*, 47 Cal., 570.
Palmer v. *Low*, 98 U. S., 1.
Lindsley v. *Miller*, 6 Peters. 666.
McCloskey v. *Barr*, 38 Fed., 165.
Irvin v. *Marshall*, 10 How., 558.
Paschal v. *Dangerfield*, 37 Tex., 273–289–305.

The principle of these decisions is the inevitable result of the effect of the law of Congress of 1854, which provides that all claims under Mexican grants should be submitted to the surveyor-general, who was to report his action on them to Congress for final determination. It has frequently been held that under this act all claims, whether grounded upon an inchoate or perfect title, were to be adequately protected and that this duty, imposed by a sense of national justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a hearing and determination. And that until Congress acted upon the report of the surveyor-general the courts could not pass upon any questions involving the title to lands of Spanish or Mexican origin prior to the Guadalupe treaty; that jurisdiction had been given to a particular tribunal, and therefore could not be taken up and decided by another. This being so no statute of limitation passed by a state or territory could affect the rights of such claimants.

Astrazaran v. *Santa Rita Co.*, 20 Pacf., 189.
Astrazarau v. *Santa Rita Co.*, 148 U. S., 80.
Cameron v. *U. S.*, 148 U. S., 301.
Chavez v. *Chavez*, 32 Pacf., 137–144.
Tameling v. *Emigration Co.*, 93 U. S., 644.
Newhall v. *Sanger*, 92 U. S., 761.
Leavenworth Ry. Co. v. *U. S.*, 733.
Johnson v. *Towsley*, 13 Wall., 72; 104 U. S., 636.

Limitation does not begin to run against an action for the recovery of land claimed under a Mexican grant, until the issuance of a patent to the claimant.

Valentine v. *Sloss*, 37 Pacf., 326–8–9.

In the case of *Teschemacher* v. *Thompson*, 18 Cal., 2[illegible] Judge Field, speaking of the power, duty and right of the Government of the United States under the Act of 1854, and other laws, to protect all titles, legal or equitable, acquired previous to the cession, said:

"It must determine for itself what claims to property existed at that date,

which it is bound to protect, and consequently the lands to which they apply, and the parties by whom they were then held. In protecting those claims it must necessarily make them good as against others *asserting interests from events subsequently transpiring*, for whatever interest they may possess were acquired with full knowledge of the treaty and of the obligations and powers of the new government, over which it is sovereign and supreme."

If our grant vested in us a title, and said title has not been forfeited, then these defendants are trespassers *ab initio* and are trespassers still, or, in other words, if our title was good, legal or equitable when New Mexico was ceded to the United States, it is valid to-day, and the land is still ours. Nothing done or omitted to be done after that period will affect our title.

Hornsby v. *U. S.*, 10 Wall., 224–239.

People v. *Folsom*, 5 Cal., 374–361.

Page 118 of this argument.

This case is to be determined upon what were our rights at the date of the cession of the territory. If we had a title at that time which the Government of Mexico ought, in good conscience, equity or law, to have respected, then this court must sustain our petition. Our grant having been made with authority, we had a vested right which could be divested only according to law. And if, by reason of the tide of political feeling against Iturbide and the Imperial Colonization law of 1823, one of his most important policies, Heath's rights and possession were interferred with by the Mexican authorities, it is the very essence of judicial authority, and the bounden duty of this Honorable Court, under the treaty and laws of nations to inquire whether this was done in violation of law, and, if it was, then to give appropriate remedy.

Johnson v. *Towsley*, 13 Wall., 72–85.

RECAPITULATION.

We submit that the following are a few of the cardinal principles of our case which are fully sustained by the pleadings, facts, decisions quoted, the treaty of Guadalupe Hidalgo and international law:

I.

That the grant to Heath was legally made, the ayuntamiento having authority under the law of 1823 to make such a grant to a colonist. That this grant was made absolute to Gid, individually, as a colonist, and not to him as an empresario. (Pages 16 to 79.)

II.

That the grant to Heath or Gid was made in 1823 as claimed, was recorded in the records of the ayuntamiento of El Paso, and properly placed or filed in the old Spanish and Mexican archives at Santa Fe, Mexico, according to law. (See pages 79 to 82.)

III.

That our grant was not a float, but one by specific boundaries, with center point and all corners and lines definitely fixed and located. (Pages 34 to 37.)

IV.

That Heath's grant was never annulled or revoked by authority of law. (Pages 71 to 79.)

V.

That this grant vested in Heath a title in fee *in presenti* which is protected by the treaty of the United States with Mexico and the law of nations. (Pages 89 to 95.)

VI.

1—There was no abandonment, forfeiture or denouncement of Heath's grant. Repeal of the law of 1823 releaved the forfeiture. (Page 95.)

2—The Mexican government interfered with and prevented performance of subsequent conditions by Heath thus causing his title to become absolute. Including evidence to sustain the proposition. (Pages 99 to 113.)

3—Act of grantor hindered performance and rendered conditions absolute. (Pages 113 to 120.)

Laches not applicable to this case. (Pages 120 to 123.)

There was no abandonment. (Page 127.)

4—No forfeiture occurred or was ever declared. (Pages 131 to 140.)

VII.

That the equities of the case are all with the plaintiffs; outitle is the oldest and best, the defendants taking with full knowlr edge of our rights and with positive proof and recognition of our grant are now estopped from denying our claim. (Pages 140 to 152.)

In the court below, defendants *plead abandonment*, but "*abandoned*" their plea without legally proving facts or offering argument or decisions to sustain it. They did not discuss the questions of denouncement or forfeiture, further than to argue that as Heath died in the United States *his heirs could not inherit land in Mexico*, a question not in the case, as the land at the time of his death was in the United States.

We submit that the validity of our grant is clearly sustained, that it has been shown that the Mexican government in 1828 recognized and sustained a similar grant that had been made to Jose Lerma the latter part of the year 1823 by the same authority that gave Heath his title, that the government of the United States recognized our title in proceedings to obtain confirmation of the Stevenson and Garcia grant; and that the honesty and justice of our claim is clearly sustained by abundant proof of the faithful effort on our part to fulfill the contract by performing the conditions subsequent which were prevented by the acts of the grantor. We therefore submit that this court should reverse the decree of the U. S., Land Court and sustain our petition in all its parts by granting the plaintiffs the land claimed.

J. B. Cessna,
Solicitor for Petitioners.

Robert Rae,
Of Counsel for Petitioners.

No. 78.

Court of Private Land Claims.

Supreme Court of the United States.

October Term, 1898.

J. B. CESSNA, J. B. KEEDLE, et al.,

v.

THE UNITED STATES et al.

No. 75.

Appeal from the Court of Private Land Claims.

ARGUMENT FOR APPELLANTS.

ROBERT HAE,
For Appellants.

J. B. CESSNA,
Of Counsel.

WASHINGTON, D. C.:
Gibson Bros., Printers and Bookbinders.
1897.

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Act of July 22, 1854, prohibits others from interfering with unconfirmed grants, and, if grant is good, takes subject thereto 48
Heath, having been exiled and driven off his lands by the Mexican government and prevented from performance of his promises, is released 48
Repeal of the Act of 1823 by the Act of 18th August, 1824, discharged all conditions in prior Act 48
Heath no legal right to assert his claim in a court of justice since 1848, until the passage of the Act of 1891, creating the Court of Private Land Claims, which gives him a right to assert his legal rights 49
No legal right barred, or could laches run against a legal right which the government did not permit to be asserted 49

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

J. B. CESSNA, J. B. KEEDLE, ET AL.
v.
THE UNITED STATES ET AL.
No. 78.

Appeal from the Court of Private Land Claims.

ARGUMENT FOR APPELLANTS.

This is an appeal from the decision of the United States Court of Private Land Claims dismissing the petition.

Some time in the year 1822 a Roman Catholic gentleman, an Anglo-American, and a former citizen of the State of Missouri, by the name of John G. Heath, whose Spanish name was Juan Gid, visited the province of New Mexico and settled in the neighborhood of El Paso.

Heath had resided before this in Saline county, Missouri, and was spoken of by his neighbors as being the wealthiest man in that county (Rec., fol. 190–1). Chas. E. Wood describes him as a very shrewd and intelligent man; scarcely had an equal, if any, in the State; was a leader of men all his life. He was a lawyer and a judge of the court for many years; was an eloquent speaker; * * * had considerable magnetic power and influence over men (Rec., fol. 194).

James Bryan relates of him that he was a very prominent, influential and wealthy man. He was a member of the first constitutional convention in Missouri, in 1820; was often talked of as a candidate for governor of the State, but would not take the position. Heath was wealthy; owned a great deal of land in different counties of the State and a number of slaves (Rec., fol. 189).

While residing at El Paso he made application by petition to Iturbide, who was then the Constitutional Emperor of Mexico, and so admitted and recognized by the province of New Mexico, to grant to *him*, and for himself, land of the Bracito sufficient to settle thirty families of Catholic Christians, and among them mechanics, architects, and doctors, and to establish a hospital and to store it, and also to introduce the necessary machines for the manufacture of woolen and cotton cloths, and for the manufacture of gunpowder, which was, when made, to be sold to the government at a concession (Rec. 149, fol. 231).

The land described was to be upon both sides—that is to say, upon both banks of the Bracito and embraced 130,000 acres.

Heath probably fixed the number of his families at thirty, in accordance with the Spanish law, which fixed that number for colonists as contradistinguished from empresario contracts.

The first petition of Heath was made on the 27th of December, 1822, directly to the Emperor, and was forwarded by the Ayuntamiento to His Imperial Majesty. This petition was made prior to the Colonization Act of January 3, 1823. At that time the Crown lands of the Empire were both under the Spanish law, and a special decree of the Mexican Congress vested in the Emperor, and he had power, under what might be called the common law of Mexico, which was inherited from the common law of Spain, to make such grants in such quantities and upon such conditions as he pleased, without the interposition of any Cortes or other legislative body.

Heath was a neighbor from 1819 to 1821 of Moses Austin. Moses Austin about this time (1819) had made an application to the Spanish government, through the governor of Texas, for a large tract of land in Texas, well known in litigation and in history as the "Austin Land Grant" and "Austin's Colony." This was an empresario's grant and gave permission to Austin to introduce three hundred families in Texas. This application was successful, but before Austin could avail himself of it he died. His son, S. F. Austin, took up the enterprise, but a successful revolution in Mexico against the Spanish Crown compelled Austin to make application to Iturbide for a grant of the land. He journeyed to the City of Mexico for this purpose, and arrived at the capital on the 29th of April, 1822, and found the form of government, as then established, to be a limited monarchy, in conformity with the plan of Iguala and the treaty of Cordova. While there, on the 18th of May, 1822, Iturbide was proclaimed Emperor, and on the 19th, the following day, he was declared by a majority of the legislative body to be Emperor of Mexico.

Subsequently, on the 21st of July, he was, by an order of the same Congress, crowned Emperor, and about a month afterwards the crown was made heritable in his family.

The Emperor, with the petition of Austin before him for the settlement of three hundred families in Texas, which was to be under the empresario Austin's control, and the petitions from other individuals as colonists, invited his council to frame a general colonization law to be passed by the Junta, that all that should apply should be placed on the same footing. The committee on colonization proposed a general colonization law; the discussion of which had proceeded, in detail, to within three articles of the end, when, on the 31st of October, the Congress was turned out of doors by an armed force acting under a decree of the Emperor, for the same reasons given by Cromwell, in 1643, for dissolving in like manner the Long Parliament of Great Britain. Iturbide, like Cromwell, declared that Congress was dissolved and vested the legislative power of the nation in a Junta Instituyente. The new Junta took up the remaining three articles at the end of the general colonization law and the whole Act was finally passed and was approved by the Emperor, and promulgated on the 4th of January, 1823.

At the time of the passage of this Act, the title of the public lands was vested in the Emperor, and he could, without the formation or passage of a general colonization law, make a grant of the lands for the public good; but if he chose to have the *Junta Instituyente* prescribe the conditions under which the land should be granted to empresarios and colonists, he had a legal right to do so, and whether the *Junta* was a constitutional body or not, he could lawfully use them as a council of advisers to promulgate such general rules of conduct to his subjects as he would pursue in the disposition of the public lands. His royal edict approving and his promulgation of the general colonization law on the 4th of January, 1823, was legal and binding, and a grant of public lands under it would be valid against the government or its subjects. Austin, under this law, obtained an empresario's contract to settle his lands in Texas. This grant was made to him on the 18th of February, 1823, and was issued to him by the Emperor's final decree on this subject, on the 23d of February, 1823. News reached the City of Mexico that on the 2d of December, 1822, Santa Anna, who had received his commission as general from the Emperor, and who at the time wore upon his breast the placque of the Imperial Order of Guadaloupe bestowed upon him by the Emperor, and who was commander under the Emperor at Vera Cruz, had raised the standard of rebellion.

Soon after the arrival of this news and after Iturbide had taken the field, Iturbide summoned the original Congress which he had dissolved, and a treaty was made that neither were to have any troops in the City of Mexico until a full Congress met. On the 29th of March, Congress met and it was resolved by it that the executive power of Mexico, which means the Empire which had existed since the 19th of May, 1822, up to that time, had ceased, and on the 31st of said month a decree was made that the executive authority of the Mexican nation (not Empire) should be originally deposited in a body who should be styled "*The Supreme Executive Power*," and should be composed of three individuals, etc. On the 8th of April, 1823, Congress resolved that the coronation of Iturbide was an act of violence and force, and was null.

We have seen that in the month of December, 1822, and while Iturbide was obeyed by the Cortes and all the provinces of Mexico, and recognized by these independent States as their Imperial Magistrate, John G. Heath petitioned His Imperial Majesty to designate to him the land in question, generally described, particularly located and yet unsurveyed (Rec. 149). His Majesty gave no answer to this petition, but retained it, and as a consequence of such petition along with others caused the laws of colonization under the date of January 4, 1823, to be promulgated. In consequence of this Heath applied *de novo* to the Ayuntamiento to grant him this land, and under which Act the officials at El Paso and Heath supposed the Ayuntamiento, under and by virtue of the authority of the Colonization Act of January 3, 1823, had power to grant lands to colonists out of the adjacent public land within their jurisdiction but not within the town grant, if any such existed.

Exhibit A of the *expediente* which we claim gave to Heath his title (Rec. 168, fol. 259) is dated April 3, 1823.

COUNCIL HALLS OF EL PASO DEL NORTE, *April 3d*, 1823.

The record and expediente recite that "on this day, April 3, 1823, "Don Juan Gid, doctor of medicine, of the Anglo-American nation, "from the State of Missouri, appeared requesting to know the result "of the petition which he made the former Ayuntamiento on the "27th day of December of last year through the Secretary of State to "His Imperial Majesty, and he is answered that no *immediate* reply "has been received, but that the government of the province, "through Viscaria, political and military chief (of the Emperor), in "an official communication of the 2nd of March, sent the decree of "the 3d of January of this year commanding it to be published

" and obeyed; which decree was issued by the national *junta* " *instituyente* and sanctioned by His Imperial Majesty, the thirty- " two articles of which treat of colonization matters. These (the " laws) were read to the said Don Juan Gid, and being made ac- " quainted with them he to-day made a new petition asking that " by virtue of the law and its privileges he may be given an " 'hacienda' in the same land that he had already asked for, offering " to perform everything he promises in said petition for the good " of this town and the Mexican nation."

This record further recites that "the corporation, having in mind " the said Colonization Act and the said proposals, which it con- " sidered beneficial and useful to this town, after consulting the " private individuals, resolved to provide the following in the matter " of the petition:

"That, saving the superior determination of the government by " which this shall be given, his proposals and petition are admitted, " and when he presents himself the land he asks for shall be assigned " to him in these terms: 'The head of the Bracito shall be the " central point of the square of said "hacienda"'—that is to say, two " and one-half leagues in a straight line up the river and two and one- " half leagues down the river, the same being in the side that forms " the square.

"2nd. Unimportant.

"3d. That this minute (of the board) and the petition of Don Juan " be made known to the puplic in order that if it should happen that " any Mexican citizen of the jurisdiction offers the same proposition " for the benefit of the public, etc., he may be permitted in preference " to every foreigner, for which purpose the term of three days is " given.

"4th. That Don Juan Gid having ownership of the land, etc., all " arrangements shall be made with him by any of the inhabitants of " this jurisdiction, etc., for the settlement of that place.

"5th. Unimportant.

"6th. Provides for the survey of the boundaries.

"In conclusion, for which purpose this shall be given, together " with this minute, and an authenticated copy of it shall also be made " for the protection and information of the party in interest; this " original to remain in the archives, together with the petition of Don " Juan, as a perpetual testament. Thus it was resolved by the alder- " men, together with the two alcaldes, signed before me, the secretary " of the corporation, to which I certify.

"To this Exhibit A is appended a copy of the original to be found

" in the books of entries of the minutes of this illustrious corporation,
" which remain in the archives under my charge, to which I certify
(Signed) " JUAN MARIA PONCE DE LEON,
"*Secretary.*"

This transaction was all completed on the 3d of April, 1823. Some time after the 24th of April, 1823, a letter was written by Rascon, one of the alcaldes, and Ponce de Leon, secretary of the Ayuntamiento, transmitting the petition and proceedings to the government. How long after the 24th of April, 1823, there is no means of judging. (Rec. 170, fol. 262.)

See petition and the proceedings of the Ayuntamiento. (Rec. 157, fol. 243.)

It is admitted that the United States troops, during the war with Mexico, in the year 1846, when they took possession of the town of El Paso, destroyed a large portion of the public archives of El Paso, where the originals of all grants were required to be deposited. (Rec. 175, fol. 269.)

On the 11th of April, 1823, Congress passed a decree authorizing the executive to confirm the grant to Austin, and also, in a *foot-note* to the day's proceedings an intention to declare the suspension for the future (but made no order for the publication of this matter) the law of colonization passed by the *junta instituyente* on the 3d of January, and sanctioned and published on the 4th of January, 1823, until a new resolution of Congress was passed on the subject. There is no evidence that the intention to suspend was ever approved by the Supreme Executive Power or that it was ever published.

On the 17th of April, 1823, the lands were surveyed and the livery of seisin made to Heath and the record filed in the archives of the Pueblo of El Paso. (Rec. 167, fol. 258.)

After all this was accomplished, and Heath had made his payment of the customary fees, without any notice to him, that appears of record, that there was any dissatisfaction or difficulty with his grant, he left New Mexico and returned to the State of Missouri. The evidence is uncontradicted, full and complete that Heath at the expense of some $75,000 (Rec. 111, fol. 174; Rec 116, fol. 183; Rec. 115, fol. 181; Rec. 120, fol. 189) took thirty families or more, composed of over two hundred men, women, and children, together with all the stores, wares, machinery, drugs, and a printing press, that were required of him in the performance of his promise to cultivate and settle the land granted him, and to develop the arts and

manufactories, and returned to El Paso and went upon his land and cultivated it. (Rec. 183, fol. 207 ; Rec. 129–202.)

Gregoria Herrera (Rec., 132, fol. 206) says : " I was born in Paso del Norte, and at present I reside at Juarez, Mexico. In 1823 and 1824 I was living at El Paso. I knew Juan Gid in 1822–23–24 ; saw him frequently at El Paso. I met him in 1824, in El Brazito, a land which had been granted to him on the part of the Mexican government through the intervention of the Ayuntamiento of Paso del Norte in 1823, on or near the place where to-day Las Cruces, New Mexico, is situated. At that time I passed there in company with my father, my uncle and various brothers, all of which have died. I found Gid when I was eleven years old. I remember that a dog jumped at us and frightened the mule my uncle was riding and he was thrown. * * * He left his lands on account of the fall of Iturbide. Heath could not remain on his lands because they did not let him. I know that it was generally known that the Ayuntamiento of El Paso had granted said lands to Heath, whom I saw at one time on said lands. He was generally reputed at the time in that country as the owner of the ' sitio ' of the lands * * * and it was also well known that Heath, with his family, and others which depended on him, were living on said lands some time in 1824. * * * Heath having been an American foreigner, and having obtained the grant under the laws of Iturbide, he was not allowed to occupy the lands of the grant, neither was he permitted to stay and live on them, for which reason he left and returned to the United States."

Price Cooper also says (Rec. 129, fol. 202) : " I know that a tract of land was granted to Heath in 1823 through the town council of El Paso. Got my information from Heath, the town council, and others, and have often been on the land. It is known as the Bracito, situated on the Rio Grande river, about forty miles west of El Paso. Heath was just in possession of this land ; then went to the United States to get some people to help him cultivate the same. He returned in 1824 with his family and 200 persons with him. They remained a short time on this land, and then, after the overthrow and death of Iturbide, they were driven off and returned to the United States. I met Heath and others on this land. He had brought many things with him—stores, provisions, machinery of all kinds, farm implements, plows, etc. (Rec., fols. 201–2.) Ponze de Leon, Marenio Baroelli, and other Mexican officers told me that he was driven away and not allowed to cultivate or remain on his land because the grant had been made to him under the laws and reign of Iturbide." He further says :

"I met Heath first in 1822 or 1823, at El Paso del Norte, *and on his land*, the Brayito. When he returned in 1824 he had his wife, family—four children, boys and girls, and some two hundred persons with him. Brought with him a great many things—farm implements, machinery of all kinds, stores, provisions, and printing press. When he was driven off he had to leave all his things behind him, not having the money to take them back. At the time he left he said it had cost him many thousand dollars to get here, and it would ruin and bankrupt him to go back. Many things that Heath brought were taken from him by the Mexican people and the Mexican government. I afterwards saw some of his machinery in Chihuahua. Heath was forced to leave his land under the threat of imprisonment or death." (Rec. 130, fol. 202, 203.)

This testimony is amply corroborated by a cloud of witnesses. The testimony is complete, that Heath was banished under penalty of death from his settlement and from the country, and as a consequence returned to his own country ruined and bankrupt, having lost over $75,000 in the adventure. After his banishment Mexico was in a continuous state of turbulency and revolution, over three hundred revolutions having taken place in less than thirty years. Appleton Ency., Tit. Mexico. With the state of public feeling in Mexico after the execution of Iturbide, it would have been idle for Heath to have attempted to obtain a confirmation of his rights from the government of Mexico, nor could he with safety have submitted his cause to her judicial forums. Earlier than 1836 the United States was forced to demand redress from one of this ephemeral and transitory revolutionary governments of Mexico. Mr. Buchanan, as chairman of the Committee on Foreign Relations in 1837, presented the following report to Congress:

"The Committee on Foreign Relations, to whom was referred the message of the President of the 6th inst., with the accompanying documents on the subject of our present relations with Mexico, report:

"From the documents submitted to the committee it appears that ever since the revolution of 1822, which separated Mexico from Spain, and even some years before, the United States had repeated causes of just complaint against the Mexican authorities. From time to time, as these insults have occurred, demands for satisfaction and redress have been made by our successive public ministers at the City of Mexico; but almost all of these demands have hitherto proved unavailing. * * * The committee, notwithstanding, regret to be compelled to state that all of the causes of complaint against Mexico have occurred since the conclusion of this treaty.

"If the government of the United States was disposed to exact

strict and prompt redress from Mexico, your committee might with justice recommend an immediate resort to war or reprisals."

Then follows an assent to the sentiments contained in the President's message, which counselled forbearance and moderation by giving to Mexico one more opportunity to atone for the past, etc. History tells us that these injuries and maltreatments of American citizens and the confiscation of their property was one of the *casus belli*, which brought on the late war with Mexico, and which culminated in the peace of Guadalupe, which gave to us a vast and magnificent territory, of which New Mexico forms a part. If the United States government, with all its military power, both by land and sea, could not extort justice save by war, how could its private citizens obtain redress in the courts of Mexico or through the justice of her government?

Heath could only rely on his own government for protection, and it was not until the Act of March 3, 1891, creating the Court of Private Land Claims in 1891, was established by Congress that Heath could assert in a legal form his legal rights under this grant.

Under this Act Heath's heirs and legal representatives filed a petition in the Court of Private Land Claims sitting in and for the Territory of New Mexico, on the 9th of January, 1893, setting up the facts stated in this brief in the statement of facts, and claiming that the grant to said Heath by virtue of these facts and *expediente* became an absolute and perfect grant; that the said Heath obtained a perfect title to said land; and that the petitioners as his heirs, descendants and legal representatives of his heirs and decendants, have become and are the owners in fee of said lands and entitled to the same as an absolute and perfect grant, and are entitled to hold and possess the same, and prays that the court may consider the validity of said grant of land, and that the tract with the boundaries herein set forth be confirmed unto the plaintiffs, their heirs and assigns forever, with prayer for general relief, etc.

To this petition the defendants filed a demurrer, the first assignment for cause amounting to a general demurrer.

After the demurrer was argued at length, the court overruled the demurrer and ruled the defendants to answer. (Rec. 14, fol. 24, 25.) After the answers were put in, and replications filed thereto, and the evidence taken, all the facts set forth in the petition were fully established and the court was called upon again to determine whether as a matter of law the petition was to be sustained.

The court found as matter of law, the facts set forth in the petition being fully established, that the prayer of the petition

should be denied. The opinion is found at page 259 of the Record, fol. 364.

The answer of the United States government to the petition is substantially the same as are all the answers filed in the case, and is representative of all the defenses raised, except that of subsequent purchasers. It is found on page 23 of the printed record, fol. 41.

The answer, after calling for proof of the allegations of fact in *pais*, professing to have no knowledge of the same, and demanding strict proof, goes on to deny that by virtue of the proceedings of the Ayuntamiento and of the said Heath any lawful title to the said tract of land in the petition described vested in him, or that the said Heath obtained an absolute or perfect title to said tract of land. This amounts to a general demurrer, and which was, when so filed, overruled by the court. The answer then sets up that under the provisions of the law of January 4, 1823, or the provisions of any other law then in force, the Ayuntamiento of El Paso had no power or authority to make a grant of land to Heath in the manner and form set forth in the petition. That the constituent Congress of Mexico decreed on April 7, 1823, that all acts of the preceding government, being the government by which the said colonization law of January 3, 1823, was enacted, from May 19, 1822, to March 29, 1823, were illegal, and subject to be revised, confirmed, or revoked by the government then established, and that the said colonization law of January 4, 1823, was afterwards, to wit, on the 11th of April, 1823, by the decree of said Congress, *suspended* until a new resolution on the subject shall have been passed; by reason whereof all the proceedings of said Ayuntamiento of El Paso respecting the said alleged grant of land were illegal and void and of no effect.

For a further defense it answers that, on the 11th of April, 1823, the constituent Congress suspended the said colonization law, and authorized persons who had acquired rights under said law to present their claims to the *new* government for their ratification or rejection, and that said Heath did not, nor did any one for him, ever present to said Mexican government as provided by law said claim for ratification and approval, and by reason of his failure to so present the same, abandoned and released the same to said government.

For a further answer, that from the time of said grant until the treaty of Guadalupe-Hidalgo said Heath never presented to the Mexican Government any claim for said property, but totally abandoned it.

In the answer of the United States it is set up that on the 11th day of April, 1823, the constituent (meaning the sovereign) Congress

suspended the colonization law of January 4, 1823, and authorized persons who had acquired rights under said law to present their claims to the new government for their ratification or rejection. (Rec., 25, fol. 44.)

This alleged provision is not found in any law of Mexico, and counsel must have made the allegation under a misapprehension. They probably were led into the error because Austin made such an application, but Mr. White, in his Recopilation, tells us why this was done (1 White's Recop., 569). He tells us "that on the 21st of "February, 1823, information was circulated in the city of the gen- "eral defection from the Emperor * * * and some were of an "opinion that all his acts would be annulled by Congress. This "would have thrown Austin back to where he started a year before, "and therefore too important a matter to be left unattended to. He "consulted several lawyers and other persons of information on the "subject. Some gave the opinion that all the acts of the govern- "ment *de facto*, of such individual nature as this, where the rights "and interests of individuals were alone concerned, without being "in any way connected with the general politics of the government "or nation, would be good, and others thought that it would be safer "to obtain the sanction of Congress. It was sufficient for Austin "that any doubt appeared to exist, and he determined to suspend "his journey to Texas and wait the meeting of Congress, which it "was now evident must soon take place."

If it were true that such a provision had been made on the 11th of April, 1823, or at any other time, it could not compel Heath to submit a vested right to Congress under penalty of having his right destroyed. As we have seen, under the law of Spain the king could not revoke a grant unless the grantee was in fault, and that as Iturbide had conferred on him only such powers as the king of Spain possessed under his constitution, neither Iturbide nor the government which succeeded him and which adopted the Plan of Iguala and the Treaty of Cordova for its constitution, both providing that the government should be under the laws of Spain, so far as not inconsistent with this plan and treaty, could not pass a law which would compel Heath to submit his title for confirmation or rejection.

That from the change of sovereignty under the treaty of Guadalupe-Hidalgo to the institution of this suit, notwithstanding the law of July 22nd, 1854, existed for the assertion of said claims, said Heath (notwithstanding he was dead at this late date) did not assert any interest in or right to said property in any way, and hence his title was lost if any he had.

Sets up that seventy years of laches bars his right.

Sets up that neither Heath at the time of his death in 1853 nor his heirs at any time were citizens of Mexico and therefore could not acquire by inheritance any right, title, or interest in or to the land.

Sets forth that part of said land which was included in the Gadsden treaty, made December 30th, 1853, was, while it was Mexican land, about the year 1851–53, granted to the Commander-General of the Republic of Mexico to found and establish colonies in the State of Chihuahua, Republic of Mexico, and who granted part of these lands included within the outer boundaries of Heath's grant to several colonies of Mexican citizens and distributed said lands among said colonists.

Sets up the Baca grant, made by the Mexican government before the Gadsden treaty, which was within the out boundaries of this grant; also the like grant to the Dona Anna Bend Colony.

The grantees of these grants have also filed answers substantially the same as that of the United States.

Sets up also that part of Heath's grant was afterwards granted by the Mexican government to Garcia, and that by an Act of Congress approved on the 3d of March, 1891, the 4th clause of section 13 of said Act and the 14th section of said Act, the petitioners were estopped and prohibited from claiming or setting up any claim to any part or portion of the said Bracito grant so made to Garcia and so allowed and lawfully acted upon by the said Congress of the United States, and so conveyed and granted by the said United States to the said Garcia and his legal representatives as aforesaid.

These are substantially all of the matters of defense presented by the defendants to defeat Heath's heirs and legal representatives from receiving any portion of the land granted by the Ayuntamiento and of which Heath was put in possession and to which he brought his colony of families together with all that was necessary to cultivate and develop his grant, and upon which he remained with his families until he and they were driven away and his property, costing upwards of $75,000, was practically confiscated by a new and revolutionary government, he and they were banished under penalty of imprisonment, or death should he return. Under these circumstances he returned to America, where, a year before, he was one of the wealthiest men of Missouri, to languish out the balance of his life in bankruptcy. He died in the year 1851 or 1852. (Rec. 56.)

Law Under Which the Grant was Made.

This grant was made under and by virtue of the colonization laws, Imperial Decree No. 5, of the National Junta of the Mexican empire, January 4, 1823.

White's Recop., p. 588.
Hall's Mexican Law, Art. 256.
Early Laws of Texas, p. 42.
Rocknell's Spanish Laws, p. 617.

The provisions and sections of this law necessary and essential to a proper construction of our case are as follows:

Augustin, by divine providence and by the Congress of the nation first constitutional Emperor of Mexico, and Grand Master of the Imperial Order of Guadalupe, to all who shall see these presents: Know ye that the junta nacional instituyente of the Mexican empire has decreed and we sanction the following:

The junta nacional instituyente of the Mexican empire, being convinced by the urgent recommendation of the government of the necessity and importance of giving to the empire a *general law of colonization, have thought proper to decree as follows:*

Section 1.—*Civil Rights.*—The government of the Mexican nation will protect the liberty, property and civil rights of all foreigners who profess the Roman Catholic apostolic religion, the established religion of the empire.

Sec. 2.—*Distribution of Lands.*—To facilitate their establishment the executive will distribute lands to them, under the *conditions and terms herein expressed.*

Sec. 3.—*Duty of Empresarios.*—The empresarios, by whom is understood those who introduce at least *two hundred families*, shall previously *contract with the executive*, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose, and any other particulars they may deem necessary, in order that with this necessary information the executive may *designate* the province to which they must direct themselves, the lands which they can occupy with *right of property*, and other circumstances which may be considered necessary.

Sec. 4.—*Settlement of Families.*—Families who emigrate, not included in a contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in *conformity with the instructions of the executive, may designate the lands* corresponding to them, agreeably to the industry which they may establish.

Sec. 5.—The measurement of land shall be the following:

Establishing the vara at three geometrical feet; a straight line of five thousand varas shall be a league; a square, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two or more sitios; *five sitios shall compose one hacienda.*

SEC. 7.—*Labor Defined.*—One labor shall be composed of one million square varas; that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two or more labors. These labors can be divided into halves and quarters, but not less.

SEC. 8.—*Amount of Land to a Colonist.*—To the colonists whose occupation is *farming* there cannot be given less than one labor, and to those whose occupation *is stock raising* there cannot be given less than one sitio.

SEC. 9.—*Same.*—The government of *itself*, or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

SEC. 10.—Establishments made under the former government, which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

SEC. 11.—*Equal Distribution.*—As one of the principal objects of laws in free governments ought to be to approximate, so far as possible, to an equal distribution of property, the government, taking into consideration the provisions of this law, will adopt measures for dividing out the lands which have accumulated in large portions in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands, to be fixed by appraisers.

Sections 12, 13, 14, 15, and others omitted relate to cities, towns, villages and questions not material to our grant.

SEC. 19.—*Grants to Empresarios.*—To each empresario who introduces and establishes families in any of the provinces designated for colonization there shall be granted at the rate of three haciendas and two labors for each two hundred families so introduced by him, but he will lose the *right of property* over said lands should he not have populated and cultivated them in twelve years from date of the concession. The premium cannot exceed nine haciendas and six labors, whatever may be the number of families he introduces.

SEC. 20.—*Alienation at the end of Twenty Years.*—At the end of twenty years each proprietor of the lands acquired in virtue of the foregoing article must alienate two-thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one-third part.

SEC. 21.—*Same.*—The two foregoing articles are to be understood as governing the contracts made within six months, as after that time, counting *from the day of the promulgation of this law*, the executive can diminish the premium as it may deem proper, giving an account thereof to Congress, with such information as may be deemed necessary.

SEC. 22.—*Right of Occupants.*—The *date of the concessions for*

lands constitutes an inviolable law for the *right of property and legal ownership;* should any one through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

SEC. 23.—*Cultivation.*—If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; *in which case the respective Ayuntamiento can grant it to another.*

SEC. 24.—*Tithes, Duties, etc.*—During the first six years from the date of the concession the colonist shall not pay tithes, duties on their produce, nor any contribution under whatever name it may be called.

SEC. 25.—*Same.*—The next six years from the same date they shall pay half tithes, and half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time they shall, in all things relating to taxes and contributions, be placed on the same footing with the other citizens.

SEC. 29.—*Land May be Alienated.*—Every individual shall be free to leave the empire, *and can alienate the lands over which he may have acquired the right of property,* agreeably to the tenor of this law, and he can likewise take away from the country all his property, by paying the duties established by law.

ASSIGNMENT OF ERRORS.

1st. The court erred in ruling that John G. Heath, when he presented himself under the 4th article of the National Colonization Laws of Mexico, of January 3, 1823, to the Ayuntamiento of El Paso, for the designation of lands for the purpose of cultivating the same, and establishing certain arts and industries therein, had no family with him, or families, and therefore was not a colonist within the meaning of said article.

2nd. The court erred in ruling that the Ayuntamiento had no power, under said article 4, to designate to Heath the public lands within the jurisdiction of El Paso but without the presumed pueblo lands.

3rd. That the court erred in ruling, without evidence but as a matter of legal presumption, that the town of El Paso had pueblo land of four leagues square.

4th. That the court erred in holding, without evidence, that Heath, after the grant was made and recorded, had notice before leaving Mexico that his grant would be annulled, and that he could not bring his family and machinery, &c., on account of the disapproval af the departmental assembly of his grant.

5th. In holding that the possession given to Heath of a tract of land known as the Bracito, five leagues square, with its central point

and all its corners definitely fixed, marked and located, was not a perfect grant, but only an allotment or concession, which the authorities, after resolution, could deny at pleasure.

6th. In finding and decreeing that the said petition for the confirmation of the private land claim known as the Juan Gid or John G. Heath grant has not been sustained by satisfactory proof, and that the said title so asserted to the tract of land claimed to have been granted by the Ayuntamiento of El Paso, under the colonization law of Iturbide of January 4, 1892, to John G. Heath is of no validity, and that the said grant or concession is not such a one as the United States are bound to recognize and confirm by virtue of the treaty of cession by Mexico to the United States.

7th. Erred in ordering and decreeing that "the claim to the tract of land known as Juan Gid or John G. Heath grant, situated in the county of Dona Anna, in the Territory of New Mexico, and being for a tract of land five leagues square, having for its central point the head of the Bracito Acquia, under a grant alleged to have been made on April 3, 1823, by the Ayuntamiento of El Paso, to John G. Heath, under the name of Juan Gid, is hereby rejected and said petition is dismissed."

8th. The court erred in not sustaining plaintiffs' petition by decreeing that the tract of land described therein, known as the Bracito, at its central point, had been granted to John G. Heath, in April, 1823, by the Ayuntamiento of El Paso, under the law of January 3, 1823, and that the same should be confirmed as the property of his heirs, the petitioners in this case.

There being no patent defects in the grant from the Ayuntamiento to the petitioner Heath, the application by petition to the Court of Private Land Claims should have been allowed, and the only way to defeat the grant is for the appellee to attack the power to make it.

This the appellees do by setting up—

(1) The colonization laws were suspended on the 11th day of April, 1823.

(2) That Iturbide's reign was an usurpation, and as such declared by the national constituent Congress of Mexico on the 8th of April, 1823.

(3) That if the law was in force at the date of the concession the Ayuntamiento had no power to make the grant.

(4) That if they made the grant, they made it subject to the approval of the Departmental Assembly, which was never given.

(5) That he was guilty of laches.

I.

We shall not enter into an extensive or attempt an exhaustive discussion of these questions. The brief of Judge Cessna is so full and abounds with so many citations that we ought not to vex the eye of the court by compelling the court, in some other form, to re-read them.

Before entering upon a discussion of this case, a question meets us *in limini*, which if determined adversely to the appellants, disposes of the case.

It is claimed that at the time Heath obtained his title, or a legal right to his title, such as he could upon application have compelled in her courts of justice the Mexican government to give him the title never existed, because the national colonization law had been suspended, and that the law was no longer in force in the province of New Mexico at El Paso.

The onus is upon the appellee to show that the law had been repealed or suspended at the time Heath's grant was made.

To satisfy this onus, a resolution of the Congress made on the 11th day of April, 1823, declared its intention that in the future the national colonization law of January 3, 1823, should be suspended until otherwise ordered is invoked by appellees.

The translation of this resolution, if such it can be called, does not disclose how it was adopted. It is shown, however, by consulting the originals (Annals of the Mexican Congress, Vol. 2, p. 95), it was a resolution not recorded in the proceedings of the day, but incidentally inserted in the confirmation of Austin's grant, made on that day, and this confirmation is in a foot-note to the proceedings of the day.

The Act of the 3d of January, 1823, like all the laws passed by this Congress, provides at their conclusion that they shall be submitted to the executive for his approval, and if approved, shall print and publish the same.

This resolution or declared intention of the Congress to suspend in the future this law does not pretend to repeal it, and no directions are given that the intention to suspend shall be submitted to the executive, and if approved, printed and published. Indeed this foot-note authorizes the executive under this law of 1823 to approve of Austin's grant and any other of the same kind.

Such a form of a declared intention, or rather such informal

legislative proceedings, could not have the force, under the Mexican law, of suspending or repealing the laws then in force.

Under the plan of Iguala and the treaty of Cordova, the Congress was to govern according to the fundamental laws of Spain, and so was the executive. The Congress took the oath to do so, and this plan and treaty constituted *pro hac vice* the constitution of the Mexican nation.

The civil law of Spain then still governed, and the fundamental law of this country required all laws to be published in order to constitute and complete their validity.

That the publication of a law to be obeyed by the people must be first published in the provinces where it is to be operative is fundamental, and its recognition is ubiquitous in every country governed by rational jurisprudence. It has the sanction of universal law. It was the law of Greece. It was the law of Rome, whether as a republic, an empire, or a despotism.

Caligula was wicked and powerful enough to publish the Roman laws in such a manner as to ensnare and punish the people in ignorantly disobeying them; but he was not powerful enough to dispense with their publication.

The Institutes of the Civil Law of Spain, built on the massive and splendid body of the civil law of Rome, has received a just eulogy from all commentators who have had occasion to refer to it—White, Rockwell, Hall, and others. It extorted from Lord Macaulay a confession that at the time of Charles II it was freer and better than the constitution of Great Britain.

The preamble to this noble code is noticeable for its judicial wisdom. It declares that the only object of law is justice, which is rooted in virtue and which always lasts in the wills of just men and gives and distributes to every one equally his due or right. (L. Tit. 1, p. 3, 2 White's Recop., 72.)

In the front and forehead of this admirable body of laws is announced:

"From the *first principle* it follows, first, that the law is not obligatory, unless published by proclamation or edict executed by order of the magistrate, according to Anto Accordado, L. 12, Tit. 2, Lib. 3, Nov. Rec. Second, that immediately, on being published it binds without any excuse or exemption being admitted, under any pretence of ignorance, because all, without distinction of person or quality are bound to know and study it. (L. 20, Tit. 1, part 1, and L. 1, Tit. 1, Lib. 2, Rec.) * * * That it ought to be clear and intelligible that all may understand it." (L. 28, 13 Tit. 1, part 1; 2 White's Recop., 73.) See Mr. Cessna's brief, p. 77, for further citations.

It is hardly necessary to quote authority to show that this court accepts without reserve so just and enlightened a principle of national and international jurisprudence. (Gonzalies *v.* Ross, 120 U. S. 605–615–616.)

There being no evidence in the record that this declaration of an intention to suspend the colonization law of 1823, other than in the foot-note to Austin's grant, and there being neither request to approve it on the part of the executive, nor a direction, if approved, that it be printed and published, and there being no evidence that it was ever printed or published during all the time that the proceedings occurred which ended in a consummation of Heath's title, the appellees have not established by evidence that the law of 1823 was ever legally suspended or repealed until it was repealed in 1824 under the new colonization law.

There is some evidence to show that this intention to suspend the law in the future was never carried out or consummated.

In the absence of proof that the law was repealed or suspended, the law presumes that it continued in force, and it is not necessary for the appellants to offer any evidence to strengthen this presumption, although there is, as we shall presently see, such evidence in the record.

The law will not presume that to have occurred which is physically impossible to occur. The resolution of the national Congress of the 11th of April, 1823, if intended to have the force of law *propiore vigore* without the executive sanction, and without publication, could not by any possibility, in 1823, have reached El Paso or Rio del Norte on the 17th of April of that year. Less than a week had occurred after the passage of the resolution.

It is plain from the record that the Ayuntamiento and Heath were in ignorance of its existence, and it also is plain that on the 19th day of June, 1823, the governor and departmental assembly had only received a rumor of its existence. If it was anything, it was a suspension of the law in the future, and as the executive did not confirm Austin's license until the 14th day of April, if approved by it at the time, the period of publication would be still shorter—only *three* days. If the law had been published at Del Norte the governor would have been accurately informed as to its contents. If disclosed to the governor or departmental assembly, then the assembly would never have notified, several months afterward, the Ayuntamiento that the colonization law had been repealed. It was physically impossible for the law to have reached El Paso Del Norte—fifteen hundred miles distant, and through a wilderness,—between the 11th or 14th of April and the 17th or 25th of this month.

While the law will presume everything to have been done that the law required to be done, and that the officers doing it had authority to so do, in order to sustain an executive grant, the law will not presume that anything was done at the time or afterwards to defeat the grant.

The Congress which was called together by Iturbide was elected under an Empire, and after electing an Emperor was to proceed to govern under the plan of Iguala and the treaty of Cordova. Its duty was, after the abdication of Iturbide, to either elect another Emperor or submit to the people of the provinces the question what form of government they should have, and to follow the result of the balloting; but they chose first to vent their resentments on the acts of Iturbide, and to declare his acts void and his reign an usurpation. If this were true, they had no occasion to suspend the colonization laws. A void law requires no suspension or repeal.

While it is certain they, on the 8th of April, 1823, declared Iturbide an usurper, it is not clear that they passed any law repealing or suspending the colonization laws. (Ordinances and Decrees of Congress of Mexico, Vol. 2, p. 95.)

On April 16th a decree was entered on their minutes that Iturbide is to no longer be called Emperor.

On the 15th of August, 1823, the Ayuntamiento did, upon a petition similar to Heath's in form, grant to a native Mexican, Juse Lerna by name, 400,000 acres, and which was approved by the departmental assembly. This grant was confirmed in a collateral litigation by the Congress of Chihuahua. (Rec. 249–256.)

Again, Robert Leftwich was, on the 15th of April, 1823, granted a license similar to Austin's, made under the Act of 1823. (Early Laws of Texas, p. 143.)

These grants, made before the Act of the 18th of August, 1824, and made under the Act of 1823, is evidence that the proposed suspension of the Act of 1823 on the 11th of April never ripened into a law, or was ever published as such. (Brownville *v.* Cavazos, 100 U. S. 138–142; Hurdeman *v.* Herbert, 11 Tex. 660.)

II.

The expediente is in the usual and customary form then in use for the granting of lands in Mexico for colonization. Upon its face it is perfect. There is no apparent defect in substance or form.

It is composed of the petition with the decree accepting the same, and, after a legal period had transpired after publication, for native

citizens to make a similar application; the order of reference to officers to survey and put Heath into judicial possession of his lands; the report of these officers in conformity to the order with a complete and accurate map of the survey of the boundaries of the land granted; Heath's and the Ayuntiamento's approval and acceptance of the report; and last, the decree of concession.

A record of all these doings was duly entered upon the minute book of the council.

The grant was also filed, after the territory was ceded to the United States, in the United States surveyor-general's office in New Mexico, and is numbered No. 410 of the old Spanish and American archives. (Rec. 170.)

This is sufficient to satisfy the requirements of the treaty of Guadalupe.

It is claimed, however, that Art. VI of the treaty of 1853, between the United States and Mexico, commonly called the Gadsden Purchase, which provides that "no grant of land bearing date subsequent to this treaty will be considered valid or be recognized by the United States, nor will any grant made previously be respected or be considered as obligatory which has not been located and duly recorded in the archives of Mexico," was not complied with, and the want of which defeats Heath's rights. But a small portion of this land came to us by the Gadsden Purchase, and surely the United States were not making a treaty at this time about titles concerning territory already within the United States. The Gadsden treaty only was dealing with, and referred to, titles to lands over which the United States were to obtain, by the purchase, jurisdiction.

Whether Heath's grant was recorded in any archive other than El Paso we cannot tell. The records of El Paso themselves were mostly destroyed by fire (report of Mr. Sandridge, p. 24, 147), and no record is likely to be found remaining there. We have, however, abundant evidence that it was recorded at this place. Ponce de Leon, secretary to the Ayuntiamento, so certifies. In the absence of other proof, and with the proof of the destruction of the record itself, this certificate is competent to establish this.

A treaty stipulation of this kind is not to be construed *stricti juris*,* but is to have a reasonable construction and to be interpreted to meet its object. These records are recorded in archives established

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U. S. *v.* Aguisola, 1 Wall. 358.
U. S. *v.* Sutherland, 19 How. 364.
U. S. *v.* Arredondo, 6 Pet. 729.
Hornsby *v.* U. S., 10 Wall. 237.

by law for the land grants in the province where they were made, and as such constitute an archive of Mexico.

Williams *v.* Conger, 125 U. S. 359.
Munford *v.* Wardell, 73 U. S. 420.
Anhart *v.* Messiere, 98 U. S. 491.

At all events this provision in the Gadsden treaty applies to only a small portion of the tract granted, the most of the land being acquired under the treaty of Guadalupe.

III.

The grant to Heath was a grant in fee simple.

Heath petitioned for the grant to be made to *him*. His language is, "I ask to be granted to me."

"That the land be assigned to *me*."

"I propose that families of Catholic Christians, and among them mechanics, blacksmiths, armourers, architects, mathematicians, surgeons, &c., and to establish a hospital with the corresponding drug store * * * and also to establish a warehouse stocked with all kinds of goods to sell at wholesale, and to introduce the necessary machines for the manufacture of woolen and cotton cloths, and another for the manufacture of powder, proposing, until the expense of transportation is covered, to furnish the supply of this article that the whole of this jurisdiction may require, at the very low price of one dollar per pound," &c. When we consider the great wealth and executive ability of Heath, this was no idle and insincere offer, and his subsequent performance at once proves his good faith, and demonstrates his ability to do what he promised.

In reading this petition that the land be given to *him*, and the industries he proposed to introduce, we can with propriety say in the language of Mr. Justice Brewer in the case of the U. S. *v.* The Cleveland Cattle Co. (33 Fed. Rep. 328). The language of this petition "suggests a personal business" upon Heath's personal promise and to be conducted by him. It was hardly to be supposed that he intended to take all the heads of these 30 families, including architects, surgeons, mathematicians, in co-partnership in the manufacture of woolens and gunpowder.

While he asks that he be designated as the person for the distribution of the said land, and to be respected as the legal justice for the said families, we cannot fairly segregate a single sentence from the whole context, and to say that with the national colonization law

before him, and which, when read to him, induced him to prepare a petition *de novo*, he would ask the Ayuntamiento to make a contract in the nature of an empresario's when article 4th of this law gave it no such power, is not to be supposed. Heath had been a member of the State convention in Missouri to form its constitution; was a doctor, lawyer, and had been a legislator; it is fair to presume that he intended the land for himself, to be cultivated by himself and to be distributed among his families by himself, and asked, out of abundant caution, that he should be the landlord of his lands, and be permitted to civilly govern them as a justice of the peace.

Of this kind of a concession, Mr. Justice Brewer says in the case of The United States *v.* The Cleveland Cattle Company (33 Fed. Rep. 328): "It is not the bringing of settlers, the establishment of a colony, but the encouragement of agriculture and the arts which is the purpose and consideration of the concession."

Again he says: "It is true, near the close of the petition, they use the word 'colony,' and say that in the spring they will commence operations, which shall be continued until the colony is established. Of course this word makes in favor of an empresario grant, and yet the use ought not to be sufficient to overthrow the clear import of the petitioning clause."

The Scope of the Grant.

It is a grant *in præsenti*, subject to be denounced in case Heath failed to cultivate it as he proposed, within two years from the date of the concession.

It is governed by the rule laid down construing such grants.

U. S. *v.* Arrendondo, 6 Pet. 691.
Miller *v.* Dale, 92 U. S. 473.
Gonzales *v.* Ross, 120 U. S. 605.
U. S. *v.* McLoughlin, 137 U. S. 428.

The Act itself defines and establishes this.

Art. 22 says: The date of the concession for lands constitutes an inviolable law for the right of property and legal ownership. Legal ownership of lands means ownership in fee simple. Lands are not owned in any other way. All other interest in lands nearest to ownership are held in tenancy, as a tenant for life or years. When a statute says that a person shall become the legal owner of lands it means an ownership in fee simple.

Sec. 29 provides that "every individual shall be free to alienate his lands agreeably to the tenor of this law."

This means that in case the lands are not cultivated within two years after the date of the concession, it shall be conclusive evidence that he has renounced his right of property and legal ownership. This is an alienation by statute. This is but a statutory provision for a re-conveyance by statute instead of by deed of retrocession. It is, as our statute of uses provides, that when a party holds but the dry legal title for the use of another with no active duties to perform, to feed the trust, the statute executed and conveyed the title to the *cestui que trust*. This but added another mode of conveyance to those already in use.

The promises of Heath rested in covenant and not a condition precedent that he would within two years engage in the business and industries he proposed as a consideration for the land. Had he given a promissory written obligation so to do, the proposition would be indisputable, and it is not less so when the promise is written in the grant. A promise to pay a sum of money in the future, instead of making gunpowder and selling it at a concession to the grantor, is just as plainly but a promissory obligation.

Whether Heath's conveyance was made on a condition precedent or subsequent (insisting however that it was subsequent), his attempt at performance and its prevention by the government, the grantor, is a performance in law, and entitles him to hold his lands discharged of all conditions; in other words, in fee simple.

If a *limitation* is claimed by statute until the end of the two years for cultivation, it is still a grant *in præsenti*, and it was one by which the estate was to cease upon breach of a condition subsequent to the vesting of the estate.

2 Washb. Real Prop. *457.
Finlay v. *King's Lessee*, 3 Pet. 346.
Nicoll v. *N. Y. & E. R.R.*, 12 N. Y. 121.
Underhill v. *Railroad Co.*, 20 Barb. 455.
Osgood v. *Abbott*, 58 Me. 78, 79.

And upon the question of conditional limitation, the same strict rule of construction against the creating of the limitation is to be applied as applies to conditions subsequent, and for the same reason, viz., that *it tends to destroy estates.*

4 Kent Com. *129–30, *132.
Warville, Vendors, p. 446.
Leake, Dig. Law of Prop. in Land, 238–9.

Norris v. *Renshaw*, 49 Ill. 425.
Gallaher v. *Herbert*, 117 Ill. 168.
Boone v. *Clark*, 129 Ill. 498.
Wilson v. *Galt*, 18 Ill. 431.
Jackson v. *Silvernail*, 15 Johns. 278.
Episcopal City Miss. v. *Appleton*, 117 Mass. 326.

IV.

When was Heath's concession complete? The earlier decisions of the Supreme Court attached a good deal of importance to judicial delivery of possession in Mexican land grants.

Of course when the grant was made upon such a condition, livery of seisin must be always regarded as the condition precedent to the title vesting, *a sine qua non.*

The Act of 3d of January, 1823, does not require it, but makes the date of the concession the date of ownership and ownership in fee simple.

In such cases courts have treated the judicial delivery of possession as rather supplementary and as "designated in defining boundaries," which the official surveyor was to make, and which it was the fault of the official officer if he did not so make. This court has never been called upon to decide whether livery of seisin is necessary under statutes which are provided for passing lands by grant and where the law requires such grants to be recorded.

In a country like Mexico, where the people are fond of pomp, ceremony, and public display, all customs involving these are long kept up after the substance which they symbolize have become useless and without practical vitality or utility.

When was Heath's concession complete?

The later decisions of the United States Supreme Court have not attached the same importance to judicial delivery of possession in Mexican land grants as were supposed to be attached to it in the earlier decisions on grants requiring livery of seisin to *complete* the grants, but an order that this must be done as a condition precedent to the title vesting must always be regarded as an essential and *a sine qua non.* But in statutes like the Act of 3d of January, 1823, under consideration, which does not *eo nomine* require it, the courts have treated it as rather supplementary. This court has laid great stress on this action as "designating and defining boundaries" which the official surveyor was to make, and which it is the fault of the officer if he does not make; but the court has never gravely considered or

decided whether under such a statute it is a condition precedent. (U. S. *v.* Cleveland, &c., 33 F. Rep. 328.)

In England, so soon as registry laws were created by Stat. 8 and 9 of Vic., the ceremony was useless, and by a nation distinguished for its common sense it was at once abandoned.

Massachusetts had it but a little while, but in Pennsylvania, Connecticut, and Kentucky it never occurred, nor does it now under our registry laws occur in any State of the Union. The reason was plain, the estate passed by deed, and registry gave the notoriety which livery of seisin was supposed to secure.

This court very properly, at an early date, in passing upon a Mexican grant in Malarin *v.* U. S. (1 Wall. 289), decided that by the terms of *this* grant judicial possession was necessary to complete the title.

The conditions annexed to this grant required the grantee to solicit judicial possession from the proper judge. In compliance with this requirement, within four months after the issue of the grant, the grantee presented the instrument to the judge of the district and requested him to designate. Under such a condition precedent livery of seisin is necessary. The *syllabus* of this case has been followed as laying down a general rule that livery of seisin is necessary in all cases of Mexican grants.

Following in the wake of the decision in this case, Mr. Justice Field, in the case of Graham *v.* U. S. (4 Wall. 261), treats the *dictum* as *an observation*, and the grant then under consideration perhaps justified its application. The learned Justice says: "As we had occasion heretofore to observe, the Mexican law as well as the common law made a formal delivery of possession or livery of seisin of the property essential after the execution of a grant for the investiture of the estate. Malarin *v.* U. S. 1 Wall. 289." Yet we have seen that this case lays down no such general rule applicable to the passing of all titles, but only decided the case before it—a case so requiring. No doubt the common law of Mexico, like our own common law, requires it, but our common law grew a dead letter in the presence of a living statute more in touch with the modern modes of doing business, and this new national colonization law, a parvenu without being encumbered by ancestors, gave to this new government a complete law for granting lands, and when coupled with the requirement that the title papers should be recorded in a book kept for that purpose, why, then, should not a grant made under a new government, which was not permitted to live long enough to have a custom established, receive in the courts of the United States at the suit of her own citizens the same consideration and rule of property

which she applies to the construction of her own statutes and customs? If the custom gives way in the one case, the reasons being the same, why should it not give way in the others? Is not the liberal, enlightened, and just judicial views of Mr. Justice Balwin, in Rutherford *v.* Green (12th Wh. 203), on the construction of this colonization law, in point, when it is sought to defeat a title which the evidence shows had cost the grantee on the faith of it a sum of money which, at the time, was a vast fortune, and caused him to incur so much labor in forsaking his home in the vain attempt to establish another, by adding to the terms of the grant conditions not embraced in the Act? The learned Justice, in speaking for the court, says:

"Whatever the legislative power may be, its acts ought never to be construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and show a clear design to effect the object. No *general* terms intended for property to which they may be fairly applicable and not particularly applied by the legislation, no silent implied and constructive repeals ought ever to be understood as to divest a vested right." (Approved in U. S. *v.* Arredondo, 6 Pet. 733.)

If the mere fact that the expense of the survey and the payment of the fees gave the grantee a title in Fremont *v.* U. S. (18 How. 55), with how much more reason has Heath a right to claim his title when he did all this and all else?

In speaking of the Spanish land grants of Louisiana and Florida, this court says, in Fremont *v.* U. S., 17 How. 551:

"Upon the receipt of the petition the governor or other officer who had the power to grant issued what is usually called a concession to the party, authorizing him to have the land surveyed by an official officer of the province to grant in *absolute ownership*."

In this case the absolute ownership passes when the official officer surveys the land and makes the grant, and the date of concession gives the grantee but an inchoate right to the land, made perfect by his having the land surveyed according to the terms of concession.

Not so with Heath's concession. Under the Act of 1823 it is expressly provided that the right of property and ownership shall be from the date of concession, and not from the date of livery of seisin.

Grants made in California after the Act of 1823 was repealed, and the Act of 1824 was enacted, authorizing the province of California to establish the mode of making the conveyances, and such mode

had been established, livery of seisin was necessary, because made so by positive enactment.

If Heath's concession was made on the 3d or 7th, or any date before the 11th of July (provided at this time publication had been made of the supposed suspension of the law of which there is no proof), or, indeed, any date prior to its publication, then he had obtained a perfect title, or if only a right to a legal title such as in an honest court of justice in Mexico would have been awarded him, then in such a case he has a right to file his petition in the Court of Private Land Claims, and should have his claim allowed.

V.

In answer to appellee's second proposition, that Iturbide's reign was an usurpation, and as such declared by the national Congress null and void on the 8th day of April, 1823, and that all laws passed under it as a consequence were inoperative and void.

In 1821 a successful revolution on the part of Mexico was begun, under the lead of Iturbide, against the Crown of Spain. Its object was the independence of Mexico and the establishment of a constitutional monarchy. February, 1821, a treaty was concluded at the city of Cordova between D. Juan Donohoe, Vice-Roy of Mexico, &c., and Iturbide, and the plan of Iguala was adopted February 21, 1821. The plan of Iguala was for—

(1) The preservation of the Catholic religion.

(2) The Independence of Mexico under a constitutional monarchy with some member of the reigning family of Spain on the throne.

(3) The amicable return of the Spaniards into Mexico.

These were called the Three Guarantees of the Treaty of Cordova.

The treaty of Cordova provided for the independence of Mexico with Ferdinand VII, or some other independent sovereign of loyal lineage, as its Emperor.

Iturbide, on the 27th of September, 1821, took possession of the City of Mexico and formed a Junta Soberna guber nativa—*i. e.*, a sovereign governing junta composed of the most illustrious and distinguished men and patriots of Mexico. They first took the oath of allegiance to support the plan of Iguala and the treaty of Cordova, and organized under Iturbide as President. Under section 7th of the plan they were to proceed according to the laws of Spain.

This junta, under the plan of Iguala, called a congress to form a constitution, and to elect as Emperor whatever prince named in the

treaty of Cordova should accept the crown. After these congressmen were elected they took a like oath. The treaty provided that in case Ferdinand VII, Arch-Duke Charles of Austria, and Prince Luca should be invited, and, in case they declined, Congress was free to elect whom they pleased as Emperor.

This Junta issued the Act known as the Act of Independence. This Act also provided that the government is to be established in accordance with the plan of Iguala and the treaty of Cordova.

Upon the treaty of Cordova being rejected by Spain, Iturbide was, on the 18th of May, 1822, proclaimed and elected Emperor of Mexico, under the title of Augustus I. Iturbide took the oath of office. A month afterwards Congress unanimously established the title and address of the royal family. On the 21st of July, 1822, or a few months after he had been elected, Iturbide and his wife were anointed and crowned in the Cathedral with all the solemnity observed on such occasions. Nearly a month afterwards the throne was made hereditary in his family.

The choice of Iturbide as Emperor was ratified, without opposition, by the provinces, and which were up to that time free, several and independent States, and Iturbide found himself in peaceful possession of a throne to which his own abilities, services, and a concurrence of favorable circumstances raised him.

Upon the declination of the treaty by Spain, a *change of person*—who should be the sovereign, rather than a system—was contemplated.

After the crowning of Iturbide, it became necessary to designate the powers of the executive to prevent them from interfering with those of the Cortes. On this occasion the dangers and difficulties governing the nation, without a written constitution, were forcibly urged by some of the most enlightened members, and it was proposed to adopt that of Spain until they could form one of their own. This measure was agreed to, unless at variance with the plan of Iguala, the independence of Mexico and the decisions of the Cortes. Annals of Mex. Cong., 287, 293, 295, 299.

These various Acts of the Cortes in the provinces establish that, *inter sese*, the reign of Iturbide was, during its existence, not only a *de facto* but *de jure* a valid government, and all contracts made between this government and its subjects or foreigners is legal and binding.

A grant of land made under Iturbide's authority was, under the constitution of Spain, which was adopted for his authority, irrevocable, unless through the default of the grantee. Novisima Recop. L. B. 3, Tit. 5, L. 1; 2 White's Recop. 99.

That upon the recognition of the government of Iturbide as an empire by any other government it was valid at the courts of the country so recognizing.

It is a settled rule of both domestic and international law, and so laid down by the publicists of Europe and the decisions of every enlightened court in christendom, that upon the recognition of the executive department of government of a foreign nation it is not open to the courts to question it. Emperor of Austria *v.* Day & Kossuth, 3 D. Gex. F. & J. Rep. 217.

This principle is an integral part of the law of nations, and the United States, being one of this family, is, in the absence of positive legislation or treaty, governed by it, and through the government, its courts.

Under the treaty of Guadalupe these laws are recognized for the enforcement of grants similar to this, and under the Act of 3d of March, 1891, the custom and law of nations are expressly provided for in governing the court in its judgments.

In addition to this, the President of the United States, on December 14, 1822, received Don Jose Manuel Zoyaya, who was presented by the Secretary of State as Envoy Extraordinary and Minister Plenipotentiary from Mexico, with numerous suites of officers. Niles Reg., Vol. 23, p. 24.

On April 26, 1822, Mr. John Quincy Adams, Secretary of State, in reply to a protest from the Spanish Minister, wrote a letter on the 6th of April, 1822, in which he recites that the independence of Mexico has already occurred. Annals of Cong. No. 39, 17 Cong. 1821–22, pp. 20, 99, 21, 35.

It is true that Congress did not until some time later recognize the independence of Mexico, but under the power given to the President of the United States to receive ambassadors the executive and not the legislative department of the government was authorized to recognize the existence of foreign nations.

VI.

If appellees' proposition that Iturbide's reign was declared by the national Congress an usurpation were true, the consequences would not follow so as to invalidate Heath's grant.

Exhibit A (Record, 168, folio 269) is a copy of the expediente, recorded in the book of records of land grants at El Paso. We claim that this expediente gave Heath his title *in præsenti.*

It is dated April 3, 1823, but the petition upon which it is granted

is dated "April 7, 1823." The supplementary proceedings closed on the 25th of April. The averment of the expediente as a solemn record is to be taken as true. Youtz *v.* U. S., 23 How. 484; McGarraghan *v.* New Idria M. Co., 49 Cal. 331; Teschemaker *v.* Thompson, 18 Cal., p. 11; Brannan *v.* Mesick, 10 Cal. 106.

The expediente's recitals, then, are to be taken as true, and it recites that on April 3 the grant was made.

The declaration made on the 8th of April, 1823, by the Mexican Congress, was made *flagrante bello*, and was not intended to be a repealing law. If it were so intended and could have such an effect, it would have repealed all the laws made by the prior Congress.

The declaration did not receive or require the executive sanction, nor did Congress require nor order the same to be published as a law, nor was it in fact so published.

In international law such resolutions are not respected as having the force of law.

History furnishes a similar parallel and proves at once the harmless malice and impotency of this *brutum fulmen*. After the abdication of Richard Cromwell, and upon the assembling of the first Parliament of Charles II, which occurred about the 20th April, 1660, a few hot-headed men wished to bring in a bill which would at once annul all the statutes passed by the Long Parliament and its successors, but the good sense and love of justice, and the learning of the law judges in the House of Lords, did not permit Parliament to proceed quite to this length, and while by the statute of Charles II, Chap. 12, it was declared that the name and style of the liberties of England, and the name and style of the Protector of the Commonwealth of England, Scotland and Ireland, etc., "that the names and styles aforesaid, and every one of them, are most rebellious, wicked, traitorous and abominable usurpations, detested by this present Parliament, as opposite in the highest degree to His Sacred Majesty's most just and undoubted right," yet no one would suppose that the treaties and covenants of the greatest prince that ever sat upon the English throne, though of no royal lineage, were null and void on this account, and a grant of public lands made by him during his protectorate would not be regarded by England itself, or when brought in question involving a matter to be settled by international law, in a foreign court, as null and void. Political acts like the confiscations of estates for political offenses, the proceedings of the High Court of Justice, political prosecutions, as impeachment for treason, might be so treated by a new government established on the ruins of the old, but sales of estates made by virtue or pretense of

any act ordered by the Long Parliament would be confirmed in every English court of justice.

In the case of the Emperor of Austria, whose title to the crown was sought to be questioned, and the point raised that the father of the Emperor was still alive, and hence his title to the throne was superior to that of his son, the court says that such a legal contest cannot be entertained in a foreign court. The court asks, *in arguendo*, should we permit any claim to the sovereignty of France to be made in an English court by the Comte de Chambord or the Comte de Paris, or "suffer any inquiry into the coup d'état by which the republic was overturned in 1851, or the fairness of the subsequent election of his imperial majesty by universal suffrage?"

VII.

The Act of January 3, 1823—The National Colonization Law.

The Emperor Iturbide, being *dominus rei*, as the source and fountain of the title to the public land, just as, and to the same extent, as the King of Spain, under its constitution, was the owner of all the public lands under the dominion of the Empire, and as such held and disposed of them, not only by virtue of his imperial prerogative (U. S. *v.* Sandoval, 167 U. S. 296), but also by the power conferred on him by the Cortes to hold and have such powers as the King of Spain had possessed; and having before him several petitions, some of empresarios, and others of colonists, he found it necessary, in order that there should be no favoritism in the granting of public lands and that the rights of all who should apply should be equal, to submit to his Junta to frame, pass, and submit to him a suitable law in order that he and they might better lay the foundation for a great populous and prosperous empire.

VIII.

The Power of the Ayuntamiento to Grant the Colonists who shall Present Themselves before this Body asking for a Grant, &c., under the Act of the 3d of January, 1823.

Before considering the question as to this power under the Act of 1823, it might be useful to briefly inquire into the powers previously exercised and the office of the Ayuntamientos heretofore performed in the Spanish government's *modus operandi* of granting public lands.

Under the Act of January 4th, 1813, the Ayuntamiento were authorized to make grants of land other than pueblo lands, with the subsequent approbation of the government, but it was held that the neglect of the Ayuntamiento to so report, did not vacate the grant. U. S. *v.* Arredondo, 6 Pet. 696; Maxwell Land Co., 139 U. S. 569; McMicken *v.* U. S., 97 U. S. 204–216; Hale *v.* Russell, 101 U. S. 509.

Sometimes the Cabeldo (town council) was required to advise the viceroy and governor as to the lands that should be granted, and the viceroys could only grant on such advice. 2 White Recop., 50–51.

It is not singular, therefore, to find a provision in a national colonization law, under the new *regime*, which authorized the Ayuntamiento to grant lands in the vicinity of their own to colonists.

It is perfectly plain that Iturbide intended to give to colonists their lands without compelling them, in many cases, to travel thousands of miles to present themselves to him in order to obtain them. Austin did this, and to keep from being murdered, or robbed, traveled in the disguise of a filthy, ragged beggar. Certainly such experiences as he had would not encourage foreigners to tarry and settle in such a country, or make such a journey to ascertain whether a hacienda should be assigned them in a place remote from the capital, and situated in an independent province, and as a consequence, directed to return and present himself to the Ayuntamiento nearest where his coveted land were situate; hence two distinct kinds of persons were contemplated in the distribution for settlement upon the public land. Section 3 provides for contracts to distribute lands to foreigners introduced under the contract made with the Emperor. Section 19 of the Act provides for grants to each empresario who performs his contract, as he performs it, and section 4, which applies only to colonists who are not embraced within a contract made with an empresario, provides:

"Families who emigrate, not included in a contract, should immediately present themselves to the Ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish."

If Heath was entitled to have his lands under this Act at all, it must be under this section; in no other way could a foreign Catholic colonist obtain them; and if the Ayuntamiento were not authorized to designate them, no other body, civil or political, was authorized. The article provides that the application shall primarily be made to

the Ayuntamiento; the colonist shall not through any preliminary course or any intermediate channel present himself, but shall immediately, without intervention, present himself to this body, in order that, in conformity with the instructions of the executive, they may designate the lands.

We find that under the laws of the Indies, Liv. Tit., 2 L. 1, the word which in Spanish stands for "designate" is synonymous with the English word "grant." In one of the King's edicts it is provided: "The places which shall be designated to them (Knights, Soldiers, and Peasantry) by the governor, he will graduate such grants among them." (White's Recop., Sec. 74, p. 49.) The same language occurs in many edicts of the King of Spain, but space is not permitted for further citations.

By the promulgation of the Act of January 3, 1823, the instructions as to how the lands should be distributed were provided for, and were obligatory upon the Emperor, the Ayuntamiento, and the foreigner taking lands under them. The Emperor could give no instructions which were not embraced in the Act, and by the imperial sanction and publication of this Act its provisions contained all the executive instructions which the Ayuntamiento could have, and the foreigner took his grant subject to this law.

By the promulgation of this law all prior laws of Spain in conflict with it—written or unwritten, customary or otherwise,—as to the granting of public lands, were repealed, if, indeed, they had not been already repealed by the establishment of the independence of Mexico on the 24th of February, 1821, *for the King could then no longer hold or grant lands in Mexico.*

So soon as the Anglo-Saxon and Anglo-American legislatures passed laws of conveyancing (*i. e.*, that lands should pass by deed, for instance), and especially when registry laws were provided for, the custom of livery of seisin fell into disuse. The act of recording takes the place of that notice and notoriety which livery of seisin was instituted to give when divorced from feudal tenures.

The common-law modes of conveyancing of real estate were, if not repealed, abandoned. Livery of seisin became obsolete when it was provided the titles to lands should pass by deed and be recorded, and so in America, when the laws of inheritance were passed giving specifically the power to make wills *sub modo*, and the law of dower and courtesy were regulated by statutes, the common law governing these things was repealed.

It has frequently been held that the national colonization laws

Misplaced. see page 28.

under the Act of the 18th of August, 1824, had, in legal effect, repealed all prior laws, including the Act of 1823, and there is no valid reason why the Act of 1823 did not have as to laws prior to this the same legal effect.

U. S. *v.* Vallego, 1 Black, 541.

U. S. *v.* Vigil, 13 Wall. 450.

So soon as a party receives his deed under these modern statutes, and so soon as a patent issues and is delivered, the title passes to the grantee. So soon as the *expediente* is made, and when the *testimento* is delivered to the grantee, his title is perfect, and no livery of seisin, or survey is necessary unless the latter is required by statute or the grant so prescribes.

The 4th section of the Act of 3d of January, 1823, is the only section which makes provision for the distribution of the public lands to colonists. No one is designated in this article except the Ayuntiamento, and it provides that upon a colonist presenting himself, having a family, the Ayuntiamento are to designate the lands to him, corresponding to the industry which they may establish.

No form of doing this is prescribed, but the 34th article of the ordinances establishing the Council of the Indies requires that the applicant shall in a petition declare what he intends to ask and what he promises. (2 White's Recop. 35.)

This ordinance, although repealed, in consequence of the revolution, it became and was the universal custom and practice throughout the country in the time of the passage of this ordinance until recent times to so petition. Hence Heath, following this practice, petitioned the Ayuntamiento under the colonization law of 1823, and in the petition stated what he asked for, and recited what he intended to give as a consideration. Time was given for the native Mexicans to have an opportunity to make a like petition, and upon failure of any such doing so, the Ayuntamiento proceeded to accept his proposition and to deliver the grant to him, afterwards making a minute of the proceeding, in the appropriate book for the recording the making of such land grants, and delivered to Heath a duplicate of his title, retaining the original in the archives, &c. When this was done, Heath's grant under the statute was perfect, giving him an ownership in the land, subject to being determined by non-occupancy and non-cultivation. He was to cultivate within two years from the date of the concession. If he failed to so cultivate under article 23 of the Act, which is germane and cognate to the matters provided for in article 4, the Ayuntamiento had the power to "grant his lands to another."

It is perfectly plain that the grant, and the "grant to another" was to be the act alone of the Ayuntamiento and no other agent of the government was to control these grants.

No one would contend that the departmental assembly could under this law have interfered with or made null the grant made by the town council "to another." Why, then, not being nominated or mentioned in article 4 of this Act, the departmental assembly, governor, or a major-general, should take any power under it, it is difficult to perceive. They were strangers to it; not once anywhere mentioned or referred to in any article of the Act. There is no pretense under this Act that they could make a grant; there ought to be none that they had any power under the Act to veto any grant made by the town council, under either article.

The conclusion is irresistible that Heath, upon the provisions of the Act of 1823 being read to him, and the Ayuntamiento in reading it to him, regarded him as a colonist, and as such he fell within the provisions of section 4. This is a cotemporaneous construction of the decree and shows how all parties at the time understood it. If it were proper for the Ayuntamiento to grant the lands after two years from the date of the original grant in case of non-cultivation by the colonists, we can perceive no reason why the Congress might not have safely trusted the Ayuntamiento with the power in the first instance. The letter of the Ayuntamiento which accompanied the petition of Heath to the Emperor for the grant of these lands fully demonstrated the worthlessness of the lands and the worth of Heath's offer. A power to convey lands on behalf of the government, like the grant itself, may be construed strictly in favor of the government. It is for the government to say what persons or person shall exercise this power, and when it declares in favor of any particular person it excludes all others. Therefore, the best answer to the objection that the Ayuntamiento ought not to have such a power because they are remote from the seat of government, and as a consequence might abuse it, is, first, that the colonization law was a general colonization law to empower the Ayuntamiento to make grants to colonists, and, second, which disposes of the whole matter, the Emperor and his Congress wanted it that way, and neither the departmental assembly, though perhaps its vanity might be wounded by the neglect, nor our own courts, can make any valid objection that the executive and legislative so declared. U. S. *v.* Vigil, 13 Wal. 451–452.

In the case of Heirs of Hollowman *v.* Peibles, 1 Tex. 697, 698, it was said, in construing the articles of the Act of January 3, 1823:

"From these articles there can be no doubt that extensive authority was vested in the Ayuntamiento in issuing, granting, and revoking, and *re*granting titles to land under the colonization law of 1823."

Unless the Act of January 3, 1823, clearly discloses that the Ayuntamiento had no authority to make the grant, it having done so under a construction of the words of the Act, which might, perhaps, create a doubt, is conclusively presumed to be within its powers.

To be at once in doubt is to be at once resolved that such power was theirs. The courts will require very full proof that the Ayuntamiento has transcended its powers. U. S. Arrendondo, 6 Pet. 691–727; Jenkins *v.* Chambers, 9 Tex. 167.

The ordinary presumption that an official who makes a grant had power to make it is as to Mexican grants, owing to its daily and almost hourly fashion of shuffling off one form of government before being on with the new, which government, "like the snow-flake on the river, a moment there and gone forever," is *sui generis et ad patria*. When applied to such a government it is almost a conclusive presumption.

Mr. Justice Brown, in the case of Crespin *et al. v.* U. S., decided in November of this term, 1897, said: "Owing to the frequency with which the government (of Mexico) was changed—usually by military violence—between the time the Republic gained its independence in 1821 and the treaty of Guadalupe-Hidalgo in 1848, the revolution, accompanied with changes, annulled by decrees the acts of previous governments, cancelling grants and putting new regulations in force with respect to the disposition of the public lands, the Supreme Court, as early as 1832, in U. S. *v.* Arrendondo, 6 Pet. 691, laid down as a general proposition that the grant itself was *prima facie* evidence of its own validity, and that it would be presumed to have been regularly issued," and to the same effect is U. S. *v.* Clark, 8 Pet. 436; U. S. *v.* Percheman, 7 Pet. 51, 52, 94; Strothers *v.* Lucas, 12 Pet. 410–437; Reynolds *v.* West, 1 Col. 322, 336; Jones *v.* Garza, 11 Tex. 186–201.

After Heath's grant was made, two grants were made, one under section 3, of January 3, 1823, to an empresario by the name of Robert Leftwich on the 15th day of April, 1824, four months before the Act of 18th August, 1824, was passed and the other by the Ayuntamiento of El Paso, on the 15th of August, 1823, to Jesse Lerma. (Rec., pp. 249, 256.)

As a foot-note to the proceedings of the 11th of April, 1823, of the Congress, the day that Austin's grant was confirmed, it appears

that it was its intention that the Act of 1823 was for the future suspended, but no order made for the publication, and no evidence is introduced that it ever was so published. When it ceased to be suspended, we cannot tell, but from the fact that on the 15th day of April, 1824, a petition was granted under it for a contract, and from the fact that the town council of El Paso made the grant under it of the 15th of August, 1824, three days before the Act of 1824 was passed, which grants presume the power to make them, it may, as a legal presumption, be regarded as established that such intention to suspend was, by Congress, abandoned.

IX.

It is proper to consider the grounds upon which the Court of Private Land Claims bottoms its judgment in dismissing the appellants' petition.

The first grounds are that, in the court's "judgment, the power conferred upon the Ayuntamiento by the decree with reference to foreigners emigrating was simply to allot them lands *within* the town grant after they had signified their desire to settle in that place." (Rec., p. 291, fol. 367.) Before announcing this judgment the court gives some of its reasons for reaching its judgment. These reasons are: "We think there are two grounds upon which the claim should be rejected: First, it was *families* not included in a contract alone which the Ayuntamiento was empowered by the fourth section of the decree to settle. * * * While Heath was not an empresario within the meaning of the third section, his petition and action of the Ayuntamiento thereon clearly constituted a contract."

The word "families" does not apply to a covenant, or to a contract in the nature of an empresario's contract, is the objection of the court. It is the settled rule in the construction of statutes that where the plural is used, unless expressly negatived, the plural includes the singular.

One family could present themselves and they might do this through the head of the family. Johnson *v.* Smith, 21 Tex. 722; Cessna's brief, p. 27, 28. The language of the third section is the *empresarios*, by whom it is understood those who introduce two hundred families, &c. Yet no one would say that *one* such was not enough—that it must be two or more empresarios. The language of this section is as explicit and within the express words of the statute as is the word "families" in the fourth section, and the head

of a family is sufficient, for it could not reasonably be expected that a foreigner desiring to emigrate to and settle in such a wilderness, inhabited by worse than the wild beast at Ephesus, would carry his wife and children with him, as he would his staff, pistols, or bowie knife. The courts have decided the other way in construing similar statutes. Puroyesa *v.* Schultz, 21 Cal. 513.

Without more than merely calling the court's attention to the meaning of the words "not included in a contract," we would merely suggest that the contract referred to—in which to be included would disqualify the emigrant from presenting himself as a colonist—clearly refers to the previous section, relating to contracts with empresarios, made with emigrants. The court, however, refers these words to the condition that a colonist finds himself in after he has presented himself to the Ayuntamiento.

The Court argues in a circle. The Ayuntamiento has power, it says, to assign a colonist, not included in a contract, lands within the town grant. If a colonist presents himself and asks and is given the land on condition that he shall settle in conformity with the industry which he promises to establish, the action of the Ayuntamiento in accepting his proposition and assigning him his lands clearly constitutes a contract, and, so soon as this is made, the colonist is "included in a contract," and the Ayuntamiento has, under the decree, no power to make the grant. The arguing goes round so swiftly in a circle that it makes dizzy the philosophy of logic.

The court then gives a *third* reason, not promised in the prologue of the opinion. It goes on to say: "El Paso, like other Spanish towns, *is presumed* to have had a grant of four square leagues of land, and the Ayuntamiento had the power to make allotments of land within the four leagues so granted." No such presumption exists. Hall on Mexican Law says, "Limits of Pueblos.—There never existed any general law fixing four square leagues as the extent of pueblos and towns." (Hall on Mexican Law, sec. 117, p. 151.) The Supreme Court of the United States settled this in the case of Santa Fé *v.* Rus, 195 U. S., 690, 691.

The record does not show how much lands the town had or that it possessed any.

Hence the court came to the conclusion upon this false predicate, that the power conferred upon the Ayuntamiento by the decree of 1823, with reference to emigrants, was simply to allot to them lands within the town grant. Read the preamble of the Act: "The government of the Mexican nation will protect the liberty, property, and civil rights of all foreigners who profess the Roman Catholic apostolic religion, the established religion of the empire."

Now, if no more was meant by this high-sounding pronunciamento than that the town council should have power to assign emigrants town lots, which under prior laws provided that they should be of a small and insignificant size, it sounds very much like a tempest in a teapot—an opera bouffe edict, issued by his illustrious highness and imperial majesty, the Emperor Iturbide. We have no fear that the grave and serious men who compose this tribunal will so construe this statute.

If Heath had not asked the land to be granted to himself, to be cultivated and operated by him for himself, there might have been some plausibility in the position suggested, that he was asking for a contract in the nature of an empresario contract embracing, however, less than two hundred families. The personal character of the business he was to undertake forbids us to so interpret it. The court then says: "Or if it should be said that the body had the power within the territory without the town grant, over which territory it had jurisdiction, we, the court, answer, that unless their power was enlarged by the decree, they could make allotments only in the quantities prescribed by existing law and regulations governing allotments within the town grants;" and the court goes on to say, "and we find nothing in the decree indicating an intention to confer such enlarged powers."

The appellants claim that the power was not enlarged; that it was not built upon any power then existing. It was a novel act of colonization, with a novel power bestowed upon the Ayuntamiento as the agent of the government, to distribute its lands under the 4th section of the Act.

As the pueblo lands, and the public lands outside of the pueblo lands, were entirely under the control of the general government, and the title stood in Iturbide to both classes of land, it might be contended with more plausibility, as the legislature could dispose of both lands, that article 4th, making no distinction, the Ayuntamiento might convey both to colonists; but we make no such contention. The general colonization laws were not dealing with pueblo lands, but with public lands, and we are surprised that the learned court below should have suggested such a claim for appellees as article 4 only referred to pueblo lands.

The court is cautious, however, to admit that the Ayuntamiento had no power to convey these lands unless the power of the Ayuntamiento was enlarged by the decree.

The title of the pueblo lands of El Paso, if any existed, was not in the town but in the government, and the license to use them by the

town is given to it by the government, and the government could resume the possession or could authorize the town council to sell them upon the terms prescribed in article 4 of the National Colonization Laws, and, *a fortiori*, the public lands within the jurisdiction of El Paso and outside the pueblo lands and in which it had no interest might by authority of the Mexican government to distribute and grant these lands, be granted to the Ayuntamiento, and we claim that section 4 means this or it means nothing. If it means nothing, then the colonist could not, short of going to the government at the City of Mexico, obtain a grant, which at that time would have subjected him to all the perils that St. Paul encountered and so vividly describes in his journey to Rome.

The colonization law did not refer to the pueblo lands, but to national colonization upon national vacant lands. The Act of 18th of August, 1824, following this purpose, expressly so provides.

The court says, "It seems incredible that the executive should have intended by the decree to confer upon subordinate officers lying in remote provinces the power to dispose of the public domain to foreigners in unlimited amount upon such terms as they might choose."

It must be remembered that if the Ayuntamiento was *remote* in this particular case, the lands they were to grant were also very remote and absolutely at that time worthless. The lair of a lion was not more dangerous to white men than was this wilderness.

It is also to be borne in mind that in passing upon the merits of the proposition as to how much land should be given to a colonist the Ayuntamiento were performing a judicial act, and, if so, it is no objection that the judicial officers reside remote from the capital but in proximity to the place where they are to perform their judicial duties.

Under the law of the Indies, a person offering to perform a less service than Heath offered for his lands, and in bringing in thirty families, four square leagues of territory, either in a square or lengthwise, according to the quality of the land, in such manner that when located and surveyed shall be a quadrangle, was assigned him.

Lib. IV, Law 6, White's Recop. 44.

No doubt this law, although repealed by the Act of 1823, had a great influence upon Heath (who prepared his petition before this repeal) in naming this number, and the Ayuntamiento in assigning him this land. At all events, there is no claim of bad faith on the part of either of the contracting parties.

One thing is sure, and should have attracted the attention of the court, that these lands and the Ayuntamiento were just as remote when regranting them to another as in the first instance, yet no one doubts the power to regrant.

The court concludes its opinion, that after the grant was made, and before Heath left the county to bring his family, Iturbide had been overthrown and the decree under which the privileges were extended to him had been revoked (although there is not a particle of evidence to support this, but the inference is strong, that Heath with knowledge of these facts would not have gone on a long and perilous journey to bring his property and settlement, involving a cost of a large fortune, to a place he was forbidden to occupy and own).

As to the proposition that a change of government worked an impairment of Heath's title, that will fall more conveniently in another place in this brief, so we will not discuss it for the present.

It was to this government, established under the plan of Iguala as an empire and not as a republic, that Heath, through the Ayuntamiento of El Paso, presented his petition for the assignment of the land in question. As to the quantity of land petitioned to be granted, and as to its value, the letter of the Ayuntamiento gives us a very clear idea. The letter is found in the printed record at page 144, fol. 226. The letter sets forth that the corporation, being as yet little informed of the existing orders in force in the matter of granting such land to foreigners aspiring to be citizens of the empire, and to establish themselves at the place of the Bracito, which was about twelve leagues distant from El Paso, there being no professional educated person in this place nor in the whole province with whom to consult, the Ayuntamiento recites to His Majesty the reasons it has for the benefit it seems to it may result from these inhabitants and settlers.

The letter then states that "this entire jurisdiction of El Paso has about 8,000 souls, governed politically and civilly by three common councils under the command of a Lieutenant-Governor, which government is vested provisionally in three alcaldes of this town, and in military matters it is governed by the commandant of the neighboring presidio of San Elceario; in ecclesiastical matters, by the curate of this town, etc., who governs the very near and almost contiguous towns, San Lorenzo, Senecu, Ysleta, Socarra, where the jurisdiction terminates. In all this territory we, the inhabitants thereof, desire the arts and industries demanded by the fertility of the soil be established, for up to date it can be said that we have

been in need of and are in need of everything, even being ignorant of the names of artisans, and without having masters to teach them to us, or at least to see them, in order to imitate them."

A more wretched state of helplessness and uncivilization than is shown by this extract seems improbable at this day. The nakedness of the land is here sharply and clearly disclosed.

The Ayuntamiento then declares "that when the new settlement to which the petition refers is established in the vicinity of this place, it will redound to the great benefit of these miserable, ignorant, and remote inhabitants. Therefore, as faithful subjects and with the confidence of loving sons who cry out in their necessities, and who send up to the higher hands of Your Majesty these documents which we judge necessary that Your Majesty may decree and determine what may be convenient, the parties in interest await in this town your imperial decision."

This letter is dated December 27th, 1822.

Appended to this letter are certificates of prominent public men certifying that Dr. Heath is a gentleman of high standing in the country of the United States and much esteemed for his abilities in the learned professions, and a man of firm integrity; a member of the Catholic Church, zealous, moral, and industrious; a late member of the convention for framing the constitution of the State of Missouri; a member of the House of Representatives of this State from the County of Franklin.

The domestic wants of the people of New Mexico in this locality, as well as the creation of an inexpensive militia to be used as a defense against cruel and warlike tribes of Indians, made it a public good to the whole surrounding country that such a man should become a settler among them; introducing over two hundred persons with him and bringing on the land printing presses, machinery, artisans, and skilled labor. This land was verily a wilderness, inhabited by a roaming savage tribe of Indians, and as a consequence of little or no value. It had, indeed, in its bosom the fertility which, in the care of civilization and under the statesmanship of the plow, might become a tract of great value. Like the diamond glittering at the mouth of the Ganges, valueless for delight or usefulness until the hand of commerce and enterprise plucks it from the depths, and takes it to the markets of trade, this land, for the first time, when intelligent labor and enterprise settles it, becomes a jewel of great price.

It was on this account and the deplorable condition of the country that the Emperor approved of a colonization Act that

would enable the Ayuntamiento to designate the lands to colonists that should present themselves to the Ayuntamiento of the place where they might wish to settle, in order that these colonists might settle the lands agreeably to the industry which they might desire to establish. There being no longer viceroys, the Emperor felt the same necessity for political agents to designate the lands, as induced the King to revoke his decree requiring titles to colonists to be presented to him. (Hall's Mexican Laws, § 27.) The reason given was the great distance and expense.

The Ayuntamiento of the place would be better judges of the colonists who would become their neighbors and a constituent part of themselves than the government, situated thousands of miles away, without any facility of communication or information as to the local wants of the place where the settlements were to take place. On the other hand, the empresario, acting simply as a public broker of lands, with no intention of settling upon any of them himself, but only pledging his efforts to bring such persons as would become colonists on the public lands, the Emperor, himself, reserved the power to distribute such lands to such public real-estate agents, without consulting the Ayuntamientos, if any existed in the neighborhood to be settled, concerning the contract which he may make with such empresarios.

Land situated as this, and as described by the Ayuntamiento, was but a type of millions of acres and thousands of square miles in this dark, savage, and bigoted country! The Ayuntamiento could then be safely trusted with the settlement of public domain for actual cultivation of so little value as was this land, and it was wisely bestowed upon them to choose the inhabitants, if the public good alone were to be served. It was with such information as this letter from the Ayuntamiento to the Emperor disclosed that he, as the imperial owner of the title of these lands *pro bono publico* with the *jus disponendi*, caused to be framed and approved by him the colonization law of January 4, 1823. Under this Act, by section 10, establishments made under a former government, which were then pending, were to be regulated by this law in all matters that may occur, but all those which are completed shall be governed by the law of the former grant. Heath's grant, the petition of which was pending, was to be good by this law, being a petition as a colonist and not as an empresario grant.

It was truthfully recited in the minutes of the Ayuntamiento, under the date of April 3, 1823, that the petition of Heath of December 27, 1822, that the government of this province, through Capt. Don Jose Antonio Viscarra, political and military chief, in an official communi-

cation of March the 2d, sent the decree of January 3d of this year, commanding it to be published and obeyed, and in answer to Heath's inquiry as to what had been done with his petition to the Emperor, communicated to the Emperor through the Ayuntamiento the Act of the 3d of January, 1823, and as such it was read to him. Under this law, then, Heath presented himself as a colonist to the Ayuntamiento to have the lands designated to him corresponding to his proposals to settle and cultivate. Section 4 of such Act was their guide, and the *expediente*, and the subsequent survey, were made under it, by their authority and in pursuance of this section of the Act.

On the inquiry, Had the Ayuntamiento power under the Act to make the grant of the land to Heath? it may be added that at the time the Act of January 4, 1823, was passed, if we take the declaration contained in the Ayuntamiento's letter of the 27th of December, 1822, as competent evidence tending to establish its status, we find that it was governed politically and civilly by a common council, and three alcaldes of the town, who held the powers of a Lt. Governor (Rec., fol. 277). These alcaldes were a constituent part of the Ayuntamiento.

In interpreting the Colonization Act, the usages and customs which acquired the force of law when established, define and interpret the legal meaning of the statute.

The Ayuntamiento forwarded to the acting governor of the province of New Mexico the *expediente* given to Heath, accompanied by an official letter dated April 26, 1823 (Rec. 155, fol. 240, Deft. Ex. 4). About two months afterwards, on the 17th of June, 1823, the acting governor presented the report to the departmental assembly. Between the 17th and 19th of June, the assembly resolved to express to the Ayuntamiento the surprise it felt at the violent and mistaken procedure in giving land to foreigners and also in violation of the law of January 3, 1823, thus opening the door to the continual complaints of the people. The deputation refrained from making any observation to the Ayuntamiento on account of the colonization law which was the moving cause in the concession of the Bracito land to Heath having been repealed. The Assembly then gives directions to the Ayuntamiento that in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families he offers to bring, it should notify said Heath *through the Plenipotentiary of the United States*, resident in New Mexico, or in some other manner which it might deem more prompt and effective, that the possession which has been given to him at the Bracito, belonging to that jurisdiction of El Paso,

was through a mistaken and wrong understanding in relation to the colonization law already repealed, but they do not say in what particular. It is safe to say that had the suspension been duly published they would not have been misinformed. This letter is signed not by the acting governor of the province, but by one F. J. Chaveze, who was, perhaps, the presiding officer of the assembly, and by one J. B. Vigil, who was deputy secretary. There is no evidence extant from the minutes of the records of the Ayuntamiento that any action was taken in pursuance of this letter of advice, or that Heath, either directly or through the Plenipotentiary of the United States, was notified of the contents of such letter, or that the Ayuntamiento had recalled the grant if it could legally do so.

This paper was offered in evidence by the petitioners and by the defendants, but, by the petitioners as a separate paper, constituting no part of the grant. (Rec. 37, fol. 72.)

If the Act of 1823 authorized the Ayuntamiento to make grants of land under section 4 of the colonization law of 1823, and further permitted it to make such grants subject to the superior determination of the government to which the expediente shall be given by the Ayuntamiento, then, in the latter case, the government is to determine whether such grant is to be approved or rejected. On the other hand, if the Ayuntamiento was instructed under the Act of 1823 to designate the lands and to grant them corresponding to the industries which the colonist seeks to establish, the selection and determination is a judicial act which must be exercised by the Ayuntamiento itself, and not be made subject to the determination of another, especially if that other be a political and not a judicial body. No one would contend that in the judgments and decrees of this court a clause in such decrees that the parties must have the benefit of the decree subject to the determination of any of the political departments of the government could be reviewed or set aside by such department. The judgment of this court could not be reviewed or corrected by any such order of this court, and so it was with the judicial powers conferred on the Ayuntamiento to determine, and, upon such determination, to grant. Certain it is that the Act did not confer in any way upon the departmental assembly the power to grant or to approve or annul grants of public land. It is not necessary to quote authorities in support of the doctrine that such powers cannot be delegated.

The letter of the Ayuntamiento (Appellees' Ex. 2, Rec. 153, fol. 238), transmitting petition and proceedings to the governor, conclusively shows that they did not understand that the governor or the departmental assembly were to approve or reject Heath's grant.

It was a letter asking for general advice.

It recites in brief that, in consequence of the resolution made this 3d of April, 1823, upon the petition of Juin Gad, an Anglo-American, I forward to Your Excellency a copy of the minutes and application, together with the subsequent proceedings up to the *full* execution of article 4 of the decree of January 3d of this year, but as the full execution of this law is *new* in these countries, it has occasioned two particular protests, &c.

It then recites that immediately after making Heath's grant, under the date of April 17th, there were presented two other petitions, and the municipal corporations regulating the distribution of land that may be useful and beneficial in promoting settlements, agriculture, arts, &c., place this corporation under the necessity of making known to your superiority the resolution, &c.

The letter says "that if the Ayuntamiento has erred in anything, the concession has been made subject to the superior determination. Besides, it has in mind the fact that the new settler came with a recommendation in his passport from the assembly of the United States, the government of which was the first that recognized our glorious independence, and has admitted in its court the ambassadors of the empire, recognizing them with every formality."

It then states "that this letter is written that the governor may, in view thereof, order what may be just and convenient to remove *uncertainty* and to proceed with certainty in every matter."

This letter demonstrates that the Ayuntamiento were ignorant of the ways and means of carrying out the articles of the colonization law, and wanted advice to remove this uncertainty as to their conduct in the future.

Whether what they had done under article 4 was right or not, they did not know; whether the governor or the departmental assembly should approve the grant they did not know; but if it did and was not good without it, they made it subject to their superiority. The governor did not think, or the assembly, that it required their official sanction. If they had so thought they would have said so in no uncertain tone, and not have said it was bad because the colonization law *was repealed*, which was not a fact. If the Act had been repealed and the Ayuntamiento had no power to make the grant, they would be liable to Heath for refusing him his right to occupy his lands. But if it was legal, then a refusal would subject them to damages. The assembly took this view and advised them to notify Heath before he brought his goods, that he could not have his lands, and by so doing mitigate the damages.

The assembly speak of poor judgment, but no word of a want of power. Nor do they claim that the Act was repealed at the date of the grant to Heath, but only at the date of writing the letter of June 19, 1823. It is true they claim that the Ayuntamiento were mistaken.

As the law is a matter of record and speaks now with the same tongue and meaning it spoke then, and as it was a statute of a new creation, this court is as able to say whether Heath got by his expediente a good and valid title, such as if he had not been driven from off his lands, his goods confiscated, and he banished from the country under penalty of imprisonment or death, he could have legally maintained, and as he has such a title, that he may ask that the decree of the court below be reversed.

Laches.

The government never assumes to hold adverse possession against her citizens and the legal holder of lands. All the Acts of Congress which have been passed to give parties the right to establish their claim assert this. While it will not prescribe any statute of limitation for itself it will not while it is in possession of the land or in granting it to another it is the *prochein amy* of the lawful owner. Hence, the Act of July 22, 1854, prohibits settlers on such grants as Heath's from claiming any adverse rights by virtue of their possession, either under a grant from the government, or as trespassers. This is not only so by force of this statute, but on general principles deducible from the treaties under which the government acquired the land.

This subject is so fully treated in Mr. Cessna's brief that nothing can be further added. See brief, pp. 119–122.

On the 17th of April, 1823, Heath was given judicial possession of his lands, and on the 25th of the same month the matter was concluded. Heath returned to the United States, returned to Mexico with his settlement, took possession of his lands, and was driven off, as we have seen.

If his right was perfect, and the Mexican government unlawfully prevented him from performing the conditions required by the 23d section of the Act, then prevention was performance, and the condition was satisfied.

City of Chicago *v.* C. W. I. R.R. Co., 105 Ill. 73–8.

Homer *v.* Ins. Co., 67 N. Y. 48.

Deal *v.* Ins. Co., 8 S. E. R. 34.

Ferris *v.* Coover, 10 Cal. 614.
U. S. *v.* Arrendondo, 6 Pet. 691.
Jacksonville M. P. R. Nav. Co. *v.* Hooper, 160 U. S. 516.

The repeal of the Act of 1823 by the passage of the Act of 18th August, 1824, also discharged the condition if it had been operative. Mr. Cessna's brief, pp. 95–99.

That the equities are all with the petitioners no one will deny, and we trust, this being so, we have demonstrated that the legal right is theirs also, and that although justice has been long delayed on account that Heath, in his lifetime, and his heirs up to the passage of the Act creating the Court of Private Land Claims not asserting in some litigation their rights, it must be remembered that he or they had no legal means through our courts to demand as a right that his or their property should be restored. We respectfully ask that the decree below may be reversed, and such order made as the case may require.

Respectfully submitted.

ROBERT RAE,
For Appellants.

J. B. CESSNA,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

J. B. CESSNA ET AL., APPELLANTS,
v.
THE UNITED STATES ET AL., APPELLEES. } No. 79.

APPEAL FROM THE UNITED STATES COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT.

The claim in this case is founded upon a supposed grant, which was nothing but an executory contract, made without authority, annulled by the Government, and abandoned by the grantees for sixty-eight years.

The documentary evidence relied upon to sustain it is found in a copy of the proceedings of the *Ayuntamiento*

of El Paso, in April, 1823, which was found in the archives at Santa Fe, and is as follows:

DOCUMENTS RELATIVE TO HEATH GRANT.

(Defendant's Exhibit No. 9, R. 157.)

PETITION.

Dr. Don Juan Gid, *citizen of the United States* of North America, in the best legal form allowed by law, appears before Your Honorable Body and states: That, not having received up to date any answer to the communication of December last of last year, which I presented to the former *Ayuntamiento*, the predecessor of Your Honorable Body, which (communication), approved in all its parts, was forwarded to His Imperial Majesty by the same, for which reason and because of the increase (*ampleacion*) of the power which is given to Your Honorable Body by the Law of Colonization which was issued by the National Instituent Assembly (*Junta*) of the Empire on the 3rd of January of the present year: For these reasons I again have recourse through this, repeating my request to Your Honorable Body, adding that *I offer to bring for the settlement of the land of El Bracito*, which I ask may be given to me, *thirty families of Christian Catholics*, and among them *blacksmiths, gunsmiths, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors of medicine, and to establish a hospital with its corresponding drug store and proper stock therein, with the necessary instruments for all operations: also to build a warehouse supplied with all kinds of merchandise for wholesale: the necessary machines for the manufacture of cotton and cloth goods, another for the*

manufacture of gunpowder, offering, until payment of the expense of transportation, to furnish the amount of this article all this jurisdiction may need at the very low price of one dollar per pound; it being first class for the use of arms: with the understanding that in all the said trades there shall be admitted for instruction the youths whose parents may see fit to dedicate them thereto; the children of this country (suelo) having the preference thereto.

In view of what has been said and because, for establishing the said machinery, utilizing the farms, grazing stock and for the other field interests, it is indispensable that it have the extension which is necessary therefor, it behooves me to demonstrate to Your Honorable Body that the *land which may be assigned to me, limiting me to the smallest amount, be at least enough for (sea lo menos para) an Hacienda, and that said designation be made for me on both sides, that is to say, that it be on both sides of El Bracito,* because the said land being broken *it is necesary to leave out various portions of it.* I also propose to Your Honorable Body that until time permits whatever else may be desirable *this settlement be attached to the parish of this jurisdiction:* likewise that *the pasture and woodlands be common,* with the same privilege as other people of this locality: recommending that it be without prejudice to those farms (*sementeras*), and that *the petitioner be the person to whom is entrusted the distribution of said lands,* he being considered *the legitimate justice of said families.*

Candor of mind being what I most appreciate, and to join myself with my brethren, the faithful inhabitants of this empire, living always in the simple peace, in order to dispel all rumors of hatred, I ask Your Honors that, you being pleased, and *in order that the said Law of Colonization be executed in all its parts,* notice of this, my petition, be given

to the individuals of this jurisdiction, in order that all those gentlemen who like may better or equal it with a view to the right of preference, in which act Your Honorable Body, to whom is entrusted the power of Father of this Country (*patria*) will weigh at their true value, *the incalculable benefits that result from my petition* whereupon, far from seeking means to deprive it thereof, it would be encouraged in every way to procure their increase.

Wherefore, I ask and petition Your Honorable Body to be pleased to accede to what I petition, being pleased to pardon the fault that this my petition is not upon paper of the proper seal, for there is none in this place, I being ready to pay the fees that belong to the national treasury. I protest that I do not act in bad faith, and the necessary, etc.

Paso, April 7th, 1823.

JUAN GID.

PROCEEDINGS OF THE AYUNTAMIENTO.

COUNCIL HALLS OF EL PASO DEL RIO DEL NORTE,
April 3rd, 1823. Third of our Independence.

Session of this day, Don Juan Gid, doctor of medicine, of the Anglo-American nation from the States (*sic*) of the Missouri, appeared requesting to know the result of the petition which he made the former *Ayuntamiento* on the 27th of December of last year, through the Secretary of State to His Imperial Majesty, and he is answered: that no immediate reply has been received but that the government of this province, through the captain Don José Antonio Viscarra, political and military chief, in an official communication of the 2nd of March, sent *the decree of the 3rd of January of this year* commanding it to be published and obeyed; which

decree was issued by the National Instituent Assembly (*junta nacional instituyente*) and sanctioned by His Imperial Majesty, the thirty-two articles of which treat of colonization matters. These were read to the said Don Juan Gid, and being made acquainted with them, he to-day *makes a new petition asking that by virtue of the law and its privileges he may be given an "Hacienda" in the same land that he has already asked for, offering to perform everything he promises in the said petition, for the good of this town and the Mexican nation.*

This corporation *having in mind the said colonization laws and the said proposals,* which it considered beneficial and useful to this town, after consulting the private individuals, resolved to provide the following in the matter of the petition:

1st. That, *saving the superior determination of the government, to which this shall be given, his proposals and petition are admitted,* and when he presents himself, the land he asks for *shall be assigned to him* in these terms: The head (*toma*) of the Bracito shall be the central point of the square of said "*Hacienda;*" that is to say, two and a half leagues in a straight line up the river, and two and a half leagues down the river, the same being observed in the sides that form the square.

2nd. That for the reason that this jurisdiction, whose territory extends as far as San Diego only, has its woodlands up the river (*rio arriba*) and in this direction grazes its stock, *Don Juan Gid and his families shall only have the "Hacienda," the property of the lands for farming, manufactories and machines, etc., but not in the natural pastures and woods,* which shall be common to these inhabitants and its jurisdiction, as they shall be to the new settlers.

3rd. That this minute, and the petition of Don Juan be made known to the public in order that if

it should happen that any Mexican citizen of the jurisdiction offers *the same propositions for the benefit of the public*, promising to comply with the respective articles of the said decree, he may be admitted in preference to every foreigner, for which purpose the term of three days is given, which time will also serve for the people to show if it is their desire to have *these neighbors, who offer to them instruction in the trades and industry, by settling in El Bracito*, which is about sixteen or eighteen leagues distant from this jurisdiction, and at a place on the frontier, close to the regular habitations of the Apaches.

4th. That Don Juan Gid having the ownership (*propiedad*) of the lands of the "*Hacienda*," all arrangements shall be made with him by any of the inhabitants of this jurisdiction who may desire to locate at El Bracito for the settlement of that place.

5th. The proposals made by the new settler for the benefit of the town are admitted, hoping that he may execute them, as well as comply with the articles of the colonization decree which have reference to him, this *Ayuntamiento reminds him that the families which he shall bring must be honest and belong to the Roman Catholic Apostolic religion*, the only one of the whole empire, by whose laws all who settle in it must abide.

6th. That for the designation of the boundaries of the "*Hacienda*" and the possession of the same, some of the *Alcaldes*, one alderman, and one public attorney will go, who together with Don Juan Gid will examine the *lands suitable for settlement in the territory of the "Hacienda,"* as well as for agriculture, machines and manufactures, which (land) *must be distinguished from that of summer pastures* (*agostaderos*) *and for stock raising.* And it is to be hoped that the

new settlers, so far as they may be able, will surround themselves with plantations of trees, and that the police order be kept so as to facilitate the spiritual and temporal instructions and administration, this to be in the manner to be provided by the secular and ordinary ecclesiastical authorities, for which purpose this shall be given together with this minute, and an authenticated copy of it shall also be made for the protection and information of the party in interest; this original to remain in the archive together with the petition of Don Juan, as a perpetual testimony. Thus it was resolved by the aldermen, who together with the two *Alcaldes* signed it before me, the secretary of the corporation, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
José Manuel García.
José Maria García.
Juan Gil.
Lorenzo Provencio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

It is a copy of the original to be found in the book of entries of the minutes of this Illustrious Corporation, which remains in the archive under my charge, to which I certify.

Juan Maria Ponce de Leon, Secretary.
[Rubric.]

(R., 168.)

COUNCIL HALLS OF EL PASO, April 3rd of 1823.

The petition of Don Juan Gid being presented it was admitted by the Illustrious Corporation *under the terms which it agreed upon* in the minutes of this day, which when seen by the said Don Juan, *he accepted*, and therefore, on Sunday the 13th instant, the said petition and the minutes will be made public in the manner customary in this place for the purpose they specify. Don José Ygnacio Rascon and Don José Morales, Constitutional *Alcaldes*, executors of the resolutions of their Honorable Body, thus decreed and signed before me, the secretary of the corporation, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.

JUAN MARIA PONCE DE LEON,
Secretary.

(R., 158.)

At the Town of El Paso del Norte on the 13th day of the month of April, 1823, having assembled in these consistorial halls those of the Illustrious *Ayuntamiento*, and a large number of the residents who were previously summoned in the customary manner, the petition of Juan Gid and the minutes of the resolution were read, of which the people once being cognizant and being asked by the First *Alcalde* as to whether they were pleased with the *new neighbors who contemplated joining this jurisdiction*, they answered with many voices in the affirmative showing pleasure and no opposition. Wherefore, immediately it was determined that, on the 16th day of the present month, in consequence of the resolution the *Señor Alcalde* of second election, the public attorney (*síndico personero*) Don Lorenzo Provencio, and the secretary of the corporation, shall go with the petitioner to the place of El Bracito for

the purpose of making the surveys and to execute (*practicar*) what had been resolved by their Honorable Body, by virtue of the sovereign decree of the 3rd of January relative to the colonization system. And by this action the two *Alcaldes* so determined and signed it before me, the public secretary, to which I certify.

JOSÉ YGNACIO RASCON.
JOSÉ MORALES.

JUAN MARIA PONCE DE LEON,
Secretary.

(R., 159.)

COUNCIL HALLS OF EL PASO, April 13th, 1823.

The action taken in order to proceed to the execution of the survey and to the possession of the land of El Bracito, which is to be given to Don Juan Gid, being concluded, let the *expediente* in the condition in which it is found be delivered to the commission composed of Don José Morales, Second Alcalde, the Alderman Don José Maria Belarde, the Public Attorney, Don Lorenzo Provencio, and the Secretary of the Corporation Don Juan Maria Ponce de Leon, in order that when their commission to conclude, according to the foregoing writ, they may return it to this corporation to proceed to the other matters that may follow. And by the present decree the Illustrious *Ayuntamiento* thus resolved, the president thereof signing it before me, the secretary, to which I certify.

JOSÉ YGNACIO RASCON.

JUAN MARIA PONCE DE LEON,
Secretary.

(R., 160.)

COUNCIL HALLS OF EL PASO, April 15th, 1823.

Don Agapito Albo, Deputy to the Most Excellent Corporation of this Province, who resides in this town, presented himself in the character of attorney for this corporation and said: that on account of his duties, and being commissioned by the district, he represented that this *Ayuntamiento* having resolved *to make a grant to the families whom Don Juan Gid proposes to settle* in El Bracito, it appeared to him that with the farms and machinery offered by the *new settlers* in a few years they might be prejudicial to the old inhabitants in all this jurisdiction, for the reason that when the waters would be turned off above and consumed in those farms they would not reach these other ones in the volume desired. Which suggestion being noticed by the members of this body they proceeded to discuss it, and it was determined by all the votes unanimously that the petitioner Don Juan Gid be called, who being present, said that if the case would happen when there would be scarcity of water in this copious river *he and his families* were of the understanding that they had to govern themselves by the wise and prudent laws of the kingdom and the regulations of the *Ayuntamientos* to whom by these it belongs to see that the waters are well distributed. In view of this, and because the said Don Juan again referred to the subjection to the laws and ordinances of the empire, it was resolved to continue the execution of the decree of the 13th instant, which (decree) was given in consequence of the first order of this Honorable Body: and by this order they thus determined and ordered it executed, the gentlemen composing this Illustrious Corporation signing it

before me the secretary of the corporation, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
Antonio Prudencio.
José Maria García.
Saturnino Aguiar.
José Manuel García.
Juan José Gil.
Lorenzo Provéncio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

(R., 159.)

Yesterday the corporation being in session, I offered to that Honorable Body various suggestions that it would be prejudicial to this community and the neighboring ones if the giving of property for *Hacienda* to the petitioner, Don Juan Gid, was carried into effect in the lands known as the El Bracito: stating in detail the causes occasioning the harm, to which I was answered that the matter would be discussed by Your Honorable Body, and that its decision would be made known to me by showing me the proceedings had for that purpose. But that has not been done. From the statement that I enclose it appears that to-day possession is to be given to the said Gid, ignoring the form of what has been newly resolved by Your Honorable Body. Among the many things that I suggested one was that it appeared to me unwise that this matter should be

acted upon at once, and that it should be duly considered for greater certainty. Doubtlessly Your Honorable Body has not borne in mind that whatever property the *Ayuntamientos* give to the citizens of the empire, it is necessary under the law to publish thirty proclamations on as many days, to await the claim that may allege a better right: why not so in this case which I find to be of greater necessity. This omission, in my opinion, makes me apprehend that Your Honorable Body hurries with gigantic strides perhaps *to have that annulled which you are going to transact*, and for which you will be responsible to the claims of public law, as it is enunciated in the said statement, which for the reason that it is made a part of the proceedings, to make a demand holding me and Your Honorable Body responsible, it is indispensable for me to take this step to relieve myself of it; and in that case Your Honorable Body will be responsible and not I, attaching this and that which I enclose to the proceedings transacted.

God preserve Your Honorable Body many years.

Paso, April 16th, 1823.

AGAPITO ALBO.

Señor President and Members of this Illustrious Ayuntamiento.

(R., 163.)

(*Justice's Order.*)

COUNCIL HALLS OF EL PASO, April 17th, 1823.

As prayed by the party let it be answered and added to the *expediente*. RASCON.

(R., 163.)

(*Petition presented to Don Agustin* [*Agapito*] *Albo by two citizens.*)

Señor Provincial Deputy, Don Agapito Albo:

Don Francisco Montes, alternate deputy, and Don Antonio Orcasitas, both residents and citizens of this town, state to Your Excellency in the best form, that it having come to our notice that to-morrow the 16th of the present month, members of the corporation of the *Ayuntamiento* of this said town go to give possession to Don Juan Gid, Anglo-American, of the territory of El Bracito on which is to be designated to him the ground for an "*Hacienda*," which must consist as he states in the same, of five leagues square, and to give him the absolute ownership (*propiedad*) thereof on the conditions (*proposiciones*) that he states in the same to the said Illustrious *Ayuntamiento*, and it appearing to us that it must be burdensome to the inhabitants of this town and the neighboring ones, for the reasons which, if it be necessary, we will go and demonstrate, we bring it to the notice of Your Excellency in order that you may be pleased to make it known to the said *Ayuntamiento*, stating at the time what you may deem proper in the matter. And if Your Excellency considers it worth while, make it appear to the said corporation to be pleased to lend attention to the suggestions that occur to us. It being an indispensable circumstance, in our opinion, in order to avert a damage of so great proportions, and in case of its not acceding to this our humble supplication, it is necessary for us to hold Your Excellency or the Illustrious *Ayuntamiento* which proceeds in the matter responsible according as there is motive therefor under the laws; being pleased to receive this our solicitation upon common paper, as none of any seal

can be found. We swear not to be in bad faith, and in the necessary and so-forth.

Paso, April 15th, 1823.

FRANCISCO MONTES.
SANTOS ORCASITAS.

(R., 164.)

(*Justice's Order.*)

This suggestion is of no value because it is contradicted by the writing of Don Santos Orcasitas, presented to the first *Alcalde* on the 19th of April, which is attached to the *expediente*, and only Don Francisco Montes remains pending (*pendiente*).

JOSÉ YGNACIO RASCON.

(R., 165.)

(*Communication in reply to Don Agapito Albo.*)

COUNCIL HALLS OF EL PASO OF THE RIO DEL NORTE, April 17th, 1823. Third.

On this day a paper was opened which the *señor* deputy of this province, residing in this town by permission, Don Agapito Albo, sent yesterday the 16th of the same to this Illustrious *Ayuntamiento*, in which were found a communication containing a statement made to said gentleman by the private citizens, Don Francisco Montes and Don Santos Orcasitas, both documents having reference to the gift and grant which in conformity with law this *Ayuntamiento* has made to Dr. Juan Gid in the lands of El Bracito; and the matter having been discussed with the care the circumstances require, it was resolved to answer the said Don Agapito Albo with regard to his com-

munication of the 16th instant as follows: This *Ayuntamiento* considered that it was its duty to comply, at the instance of a party, with the decree of the 3rd of January of this year, issued by the Instituent Assembly, sanctioned by His Imperial Majesty and ordered published and complied with, by the Governor of this province. For this reason and because also *it judged that it was beneficial to these poor people who stand in such great need of learning trades for their improvement, to put in execution the petition of Dr. Juan Gid*, the term of three days having expired, it is resolved to-day to answer the provincial deputy Don Agapito Albo, residing by permission in this town, in the matter of the communication which he addressed to this corporation in accordance with the suggestion made to him by the individuals he names: stating that it is not in the power of this corporation to undo what it thinks it has done in conformity with law and to the benefit of the people who are immediately under its charge. Thus this Honorable Body resolved, and I communicate it to Your Excellency in reply to the communication of the 16th instant which Your Excellency was pleased to forward to this body, which was received yesterday the 16th of the same. God preserve Your Excellency many years.

Paso, April 17th, 1823. In the Council Halls,

José Ygnacio Rascon.

Eutimio Valverde,
Secretary *ad interim* of the Corporation.

And in due witness the session of this day agreed unanimously, the said documents remaining in this archive, and, with the exception of the eighth alderman, Don Juan Gil, because he said that he did not want to be responsible, the president and the other

members who compose this corporation signed it before me the secretary *ad interim*, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Jn. Maria Belarde.
Antonio Prudencio.
José Maria García.
Saturnino Aguiar.
Lorenzo Provencio.
José Albares.

Jn. Maria Ponce de Leon,
Secretary.

Señor Alcalde of First Election:

Don Santos Orcasitas, resident of this jurisdiction of El Paso, before Your High Honor, in the best form permitted in law, appears and says: That, being a weak man by human nature itself, he must be more prone to error than to accuracy, and having had an attack of lethargy, not very long, and at the moment that he is beginning to recover or to return to himself, he sees that the light which guides and admonishes him to enquire of the first authority to make known to him what harm can result to him from being one in opinion with the authority; none: and thus awakening, as they say, the private opinion is abandoned and detested, and that of the authority is assented to in all its parts: having the kindness to receive this, my solicitation, upon this common paper as there is none of any seal. I swear not to be in bad faith, and what is necessary, etc.

Santos Orcasitas.

Paso, April 19th, 1823.

Received. Let it be attached to the *expediente*.

Rascon.

(R., 165 and 166.)

PLACE OF EL BRACITO, April 17th, 1823.

Having accepted the commission, it appears from the proceedings, was made of four individuals by the Illustrious *Ayuntamiento* in order to carry into effect the proceedings had in this *expediente*, we came to this place, where, in accordance with what is commanded, designating as the central point of the "*Hacienda*" of which Don Juan Gid is going to take possession, the mouth of the ditch of El Bracito (*boca acequia del Bracito*), he in evidence thereof, cut off with an axe the bark of two cottonwood trees, where, the wood being left bare, he put: Hacienda of Don Juan Gid, and the year of the date upon both; and then, the commission and the party in interest, Don Juan Gid, being present, they appointed for measurers (chainmen) Don Francisco Lucero and Don José Roybal, who offered to comply faithfully with the duties of their charge. That, in order to commence it, there was given to them and they received an iron chain in good condition which being measured with all care had eleven *varas* of three geometrical feet, as is provided by the Colonization Plan in Article ———. Immediately the first measurement was made about one o'clock in the afternoon over the north course (having known this point with all exactness because the operation was directed by an Anglo-American mathematician, who with the compass (*abujon*) observed the courses) the same terminating at four o'clock the same afternoon at the summit of a hill for the sake of straightness, where a cross monument was placed, and at the foot of it Don Juan Gid buried a stone inscribed with his name and the date, which he recognized as his lawful boundary, and complete measurements of two leagues and a half of five thousand *varas* each. And returning to the east (course) about three o'clock in

the afternoon the measurement was made with the needle to the course (*al viento*), for there was no known water upon that land that may make it desirable for settlement or for "*Hacienda:*" and it was deemed to have the two and a half leagues upon a mount (*cerro*) called La Cueva, in the Organ Mountains; and taking the measurement about half past four o'clock in the afternoon at the cross monument on the west, this proceeded until sunset, crossing in this interval the road that goes to the Rio de las Salinas, and going down a ridge (*ceja*) one league and three "*cordeles*" of one hundred and ten *varas* was completed. And at sunrise the survey was again resumed until completing the two leagues and a half, which was on a hill belonging to the Mount Roblecito (*cerro de Roblecito*) between another black mount (*cerro prieto*) which is to the left, and a red one to the right, where with the same formality as in the other monuments the corner was fixed at that point. And about twelve o'clock of day the commission, the party in interest, and the measurers (*medidores*) returned to the central point of said "*Hacienda,*" from where at about three o'clock in the afternoon the first measurement on the south course was made and it was proceeded with until sunset, when one league and three *cordels* of one hundred and ten *varas* were completed. At sunrise the measurement was continued until completing the two leagues and a half, which was in a glen (*cañada*) that runs up from the river towards the plain below La Mesilla and opposite the Ochoa Bluffs where the cross monument was placed with the same formalities as the others: and the line from this to the south and west being taken with the needle only, the measure is given to where the two and a half leagues may terminate, for the reasons stated in that taken on the east course and

terminated at the Cueba de los Organos, this one ending at half past nine o'clock in the day. And taking the direction to the east about ten o'clock of the same day, it measured nineteen *cordels*, of one hundred and ten *varas*, as far as the road that goes to El Cobre, and as far as the river fifty-one (*cincuenta y una*) where for the reason that it was the hour of midday the said measurement was suspended: and that being passed, it was resumed at about two o'clock in the afternoon until completing the two and a half leagues which terminated upon a hill that lies to the right of the Trujillo marshes, a little beyond these, and opposite the last mount of the El Paso mountains, which is called the Paso of the Alamitos, and in the direction of the Crucitas watering place, where with the customary formalities the corner monument was placed about three o'clock in the afternoon with which the measurements with the said *vara* of three geometrical feet were concluded; at which proceeding the *Alcalde* commissioner in legal form asked the measurers if they acted with the lawfulness they had promised at the time of making the first measurement of the "*Hacienda*," which they had concluded: To which they answered that so they had done, and that they entertain no doubt or responsibility, that they have done it as they had promised. Then the party in interest, Don Juan Gid, was asked by the commission if he was satisfied with the survey concluded in that "*Hacienda*," into the lawful possession of which he was to enter according to the colonization laws; to which he replied, that, having been present at the formality with which the survey of his land had been proceeded with, he was satisfied in all its parts. That being the case, and there being no claim made to suspend the course of these proceedings, the

present commission place Don Juan Gid in lawful possession of said "*Hacienda,*" stating to him that the farm lands which he has in it are the greater part of the bottom lands of the river; that he must not use these for any other purpose except for planting all kinds of edible grains and to supply his trades with the necessaries for agriculture in every matter. That for the raising of live stock of all kinds and horses, what is given to him outside of the said bottom lands of the river is considered sufficient. Charging him also that whatever waters he may take out to run the machines which he proposes to erect, and the others that may occur to them, he must conduct them until they return to their center, so that this town and the adjoining ones of which it is the head may not in any of its parts be made to suffer. Intimating to him lastly that that for which the four individuals present were commissioned, they concluded with this act, in which what has been done until now was signed by the *Alcalde* Don José Morales, Alderman Don José Maria Belarde, Public Attorney Don Lorenzo Provencio, the interested party Dr. Juan Gid, the measurer Don Francisco Lucero, his companion José Roybal not doing so because he does not know how to sign, but he stamped with his own hand a sign of the cross, before me the secretary of the corporation, to which I certify.

José Morales.
José Maria Belarde.
Lorenzo Provencio.
Francisco Lucero.
José Roybal.

Juan Maria Ponce de Leon,
Secretary.

(R., 160.)

Having concluded the commission that the Illustrious *Ayuntamiento* entrusted to us relative to matters stated in the present *expediente*, let this be returned to the said corporation in order that that Honorable Body may do as indicated in the order of the 13th instant; and by this present provision the four commissioners thus determined to-day, the 21st of April, 1823, before me, the secretary, to which I certify.

José Ygnacio Rascon.
José ——renzo Provencio.

Juan Maria Ponce de Leon,
Secretary.

(R., 162 and 163.)

Council Halls of el Paso, April 22nd, 1823. }
Third of our Independence. }

This *Ayuntamiento* having on this day received that which by its order was to be executed by the commission appointed from its midst to do the surveying that was to be done in the land of El Bracito, this being five leagues in each direction, *the whole of it composing an "Hacienda," according to Article 5th of the Colonization Plan: which land was granted by this Ayuntamiento to Don Juan Cid for the purpose of settlement* as stated afterwards, and he being satisfied with what was done in all its parts by the said commission, it was entered as a minute in due witness thereof the president and other members of

which that is composed signing it before me, the secretary, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
Antonio Prudencio.
José Maria García.
Saturnino Aguiar.
José Manuel García.
Lorenzo Provencio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

(R., 163.)

Council Halls of El Paso, April 23rd, 1823.

To-day Don Juan Gid has presented a map made by the mathematician Don Guillermo Box, by observing the courses and in conformity with the measurements made of the land of El Bracito. And as it appears to this corporation very useful to attach it to this *expediente*, for the clearness and certainty at all times of what has been done, let it so be done; and by the present order of this Illustrious *Ayuntamiento*, thus it so determined and ordered

and signed it, before me, the secretary, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Juan Maria Barela.
Antonio Prudencio.
José Maria García.
José Manuel García.
Saturnino Aguiar.
Lorenzo Provencio.
José Albares.

Juan Maria Ponce de Leon,
Secretary.

(R., 167.)

Council Halls, April 25th, 1823.

It appearing to this *Ayuntamiento* to be desirable to aggregate to the *expediente* the minute of the resolution which it adopted on the 3rd of the present month relating to the concession of the land of El Bracito to Don Juan Gid, let it so be done for greater clearness and information in the matter. And by the present order, the president of this Illustrious Corporation so decreed, ordered and signed it, before me, the secretary, to which I certify.

José Ygnacio Rascon.

Juan Maria Ponce de Leon,
Secretary.

(R., 167.)

Council Halls of El Paso, April 25th, 1823.

The present *expediente* in which there has been granted to *Don Juan Gid, Anglo-American of the*

United States, the lands of El Bracito for settlement, being considered by this *Ayuntamiento* as closed, proceed to what is to be done under the tariff in force in this *Ayuntamiento* and by its secretary that Juan Gid may know what fees he is to pay for what has been done therein, *placing the original in the archive as a perpetual testimony, but nevertheless to this shall be sent, together with a certified copy, by the first mail or safe conduct to the Governor of this Province for his superior information;* another of the same kind being given to the party in interest for his protection. And by the present order the president and members of this corporation so determined and signed it, before me, the secretary, to which I certify.

José Ygnacio Rascon.
José Morales.
José Maria Belarde.
José Francisco Carbajal.
Saturnino Aguiar.
José Manuel García.
Lorenzo Provencio.

Juan Maria Ponce de Leon,
Secretary.

(R., 168)

It is a copy of the original *expediente* which on petition of Don Juan Gid was made *in order to grant to him for settlement* the land of El Bracito, in accordance with the Colonization Plan, together with what is afterward stated: which original remains accordingly in the archive, to which I certify.

Juan Maria Ponce de Leon, Secretary.
[Rubric.]

(R., 168.)

(Here follows plat, to which is attached the following:)

I, Guillermo Box, citizen of the United States of the North of America, master mathematician from the State of Missouri: certify in legal form that the foregoing plat (*mapa*) of the place of El Brito [Bracito] for the settlement of artisans whom Dr. Juan Heath is to bring in, is made by me by order of the gentlemen commissioned by the Illustrious *Ayuntamiento* of this jurisdiction of El Paso, and in due entries thereof I signed it in said town on the 19th of April, 1823.

GUILLERMO BOX.

It is a copy.

JUAN MARIA PONCE DE LEON, Secretary.

[Rubric.]

(R., 168.)

These proceedings were transmitted by the *Ayuntamiento* to the governor and provincial deputation of New Mexico, within whose jurisdiction the land then was, accompanied by the following letter:

LETTER TRANSMITTING PETITION AND PROCEEDINGS TO GOVERNOR.

(Defendants' Exhibit No. 2, R., 170.)

MR. GOVERNOR:—In consequence of the resolution, made by this corporation on the 3rd of April of this year, upon the petition of Don Juan Gid, an Anglo-American, I forward to Your Excellency a copy of the minute and application, together with the subsequent proceedings up to the full execution of Article 4 of the decree of January 3rd of this

year relating to colonization, but as the full *execution of this law is new in these countries*, it has occasioned in two particulars the protest made by Don Agapito Albo, deputy of the province and a lawyer in this town, which I also enclose for the superior information of Your Excellency.

Immediately thereafter, under date of April 17th, there were presented to this corporation two petitions of residents of this town praying that to them also and by reason of preference there be granted to each one at least an *Hacienda* up to the river and of this all of the Bracito. The imitative circumstances of the new settlers and *the fact that this corporation has no municipal ordinances regulating the distribution of land that may be useful and beneficial in promoting settlement, agriculture, arts, etc.*, place this corporation under the necessity of making known to your superiority the resolution, *that Your Excellency may be pleased to dictate whatever may be your pleasure in the matter*, whether it be by yourself or *after consulting the Most Excellent Provincial Deputation.*

"Session of to-day, 24th of April, 1823. This place having granted it by the Most Excellent Provincial Deputation that territory extends up the river as far as San Diego, distant 40 leagues, resolved as a benefit to this public bring before the government the following articles for its approval, if it should find it convenient.

1st. That, in as much as up the river there are only the woods, *these and the pastures shall always be common* both to the families of the colonists that have been admitted in aggregation and to those of this jurisdiction.

2nd. That the farming lands on both sides of the river be not wasted by giving the property therein to stockraisers, and that those who apply for them

be obligated in the terms of the law to cultivate them, to which end it is proper to caution the public that, in asking and granting these lands, order and proportion be observed, for which a superior regulation is especially desired.

3rd. That an effort be made to keep the 30 families of colonists in the center that all those of this jurisdiction may have the advantage of the model of their industries, arts, and instruction which they promise, and in addition to this, and that the intake of water and *acequias* they shall construct above be used by all those below them who desire to imitate their industries and farms, it being understood that this corporation considers as sufficient without admitting others, the master artisans who are to settle at Bracito, to encourage the imitation of the industry and arts if all the old residents of the jurisdiction who desire and can cultivate the farming lands there are on both sides from here to San Diego and by which there will be obtained the happiness of all, and besides this a great restraint of the Apaches in their transit from this settlement to the interior of the province.

4th. That at 4 or 5 leagues distance in circumference of this town property in lands be given to nobody to the extent offered by the decree of colonization, the timber and pasture up the river being always reserved, and in the matter of water there should always be municipal regulations for its distribution and good order, and it will be convenient for these old inhabitants of the jurisdiction to acquire property in the farming between here and San Diego, leaving as we have said, in the middle those who are to be the instructors in our agriculture and industry.

5th. In order to avoid jealousies among private individuals and interests of some breeders of stock

who generally are prejudicial to these in the development of agriculture, and arts, it is observed that this jurisdiction is just beginning, and at the same time gets poorer and poorer if it is not given or provided with industries and arts, and in order to have them in its territory a means therefor is that adopted by virtue of Article 4, inasmuch as to reject it, difficulties would hereafter arise both because of the scarcity in the national exchequer and the poverty of these residents, for whom this *Ayuntamiento*, to which it very closely belongs to look out for their happiness, has without delay, put in operation the franchise of the law; *this corporation stating, nevertheless, that if it has erred in anything, the concession has been made subject to the superior determination.* Besides this, it had in mind the fact that the new settler came with a recommendation in his passport from the Assembly of the United States, the government of which was the first that recognized our Glorious Independence and has admitted in its court the Ambassadors of the Empire, recognizing them with every formality.

This *Ayuntamiento* has found it convenient and worthy of public confidence *to bring all of the foregoing before Your Excellency and the Most Excellent Provincial Deputation, that you may, in view thereof, order what may be just and convenient to remove uncertainties and to proceed with certainty in every matter*, which is what is desired.

God preserve Your Excellency many years.

Paso.

José Ygno. Rascon.

Juan Maria Ponce de Leon,
Secretary.

(R., 170–172.)

The provincial deputation disapproved the proceedings, and made to the *Ayuntamiento* the following reply on June 19, 1823 (R., 155, 156):

DISAPPROVAL BY PROVINCIAL DEPUTATION.

(Defendants' Exhibit No. 4.)

OFFICE OF THE SECRETARY OF THE PROVINCIAL DEPUTATION OF NEW MEXICO.

In the session of the 17th of the present month the Acting Govern[illegible] of this province, Captain José Antonio Vizcarra, [illegible]esented to this Deputation the reports which You[illegible]Honorable Body makes to him in an undated of[illegible]al communication which said chief received; and he also presented another official letter dated the 26th of last April, accompanied by a copy of the proceedings had by Your Honorable Body in giving to the foreigner Mr. John Heath at the Bracito, possession of land belonging to the people of that jurisdiction.

The Deputation in the same session resolved to express to Your Honorable Body the surprise it felt at *the violent and mistaken procedure* with which you conducted yourselves *in giving land to foreigners not only with prejudice to the inhabitants of that jurisdiction but also in violation of the same law of which Your Honorable Body availed itself in order to carry into effect the possession referred to,* thus opening the door to the continual complaints of its people: this Deputation refraining from making other observations to Your Honorable Body, *on account of the colonization law which was the moving cause in the concession of the Bracito land to the said Heath having been repealed;* but proceeding *to direct Your*

Honorable Body that in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families that he offers to bring, *it should notify the said Heath* through the plenipotentiary of the United States resident in New Mexico, or in some other manner which it may deem more prompt and effective, *that the possession which has been given to him at the Bracito*, belonging to that jurisdiction of El Paso, *was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed.*

And I communicate it to you by direction of the said Deputation, with the understanding that I shall communicate to you the decision that may be arrived at when the petition of Mr. Albo and the other persons of that town shall have been discussed, Your Honorable Body notifying me of *the receipt of and compliance with these instructions.*

God preserve Your Honorable Body many years.

Santa Fé, June 19, 1823—The third year of independence and the second of liberty.

FRANCISCO JAVIER CHAVEZ.

JUAN BAUTISTA VIGIL, [Scroll.]
[Scroll.]
Deputy Secretary.

The law under which the grant was attempted to be made was the national colonization law of January 4, 1823, passed by the Instituent Congress under the Emperor Iturbide. The sections which are pertinent to this case are the following, which are taken from Rockwell's Spanish and Mexican Law, pages 617–620, except as noted, where the original Spanish and a correct translation by Mr. Tipton, special agent and Spanish expert of

the Department of Justice, in the office of the United States attorney for the Court of Private Land Claims:

NATIONAL COLONIZATION LAW OF 4TH JANUARY, 1823.

(From Rockwell, except as otherwise noted, pp. 617-620.)

Art. 1. The government of the Mexican nation will protect the liberty, property, and civil rights of all *foreigners*, who profess the Roman Catholic Apostolic religion, the established religion of the empire.

Art. 2. To facilitate their establishment, *the Executive will distribute lands to them*, under the conditions and terms herein expressed. (Original: "*Que se expresarán*"="which may be expressed"—per Mr. Tipton.)

Art. 3. The *Empresarios*, by whom is understood those who introduce at least two hundred families, *shall previously contract with the Executive*, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose; and any other particulars they may deem necessary, in order that with this necessary information, *the Executive may designate the province to which they must direct themselves; the lands which they can occupy with the right of property*, and the other circumstances which may be considered necessary.

ARTICLE 4.

(Defendants' Exhibit No. 5.)

Original Spanish:

Art. 4. Las familias que por si mismas vengan á establecerse, se presentarán inmediatamente al respectivo Ayuntamiento del lugar en que quieran radicarse,

para que conforme á las órdenes con que se hallen del Gobierno se les designe por aquel cuerpo el terreno que les corresponda segun la industria que van á plantear.

(Defendants' Exhibit No. 6.)

Mr. Tipton's Translation:

Art. 4. The families who come of themselves to settle shall present themselves immediately to the respective *Ayuntamiento* of the place at which they desire to establish themselves in order that, *in conformity with the orders which they have from the Executive*, there be *designated to them* by that body the lands to which they are entitled according to the industry which they are going to undertake.

Translation from Rockwell:

Art. 4. Families who emigrate, not included in a contract, shall immediately present themselves to the *Ayuntamiento* of the place where they wish to settle, in order that this body, *in conformity with the instructions of the Executive*, may *designate the lands* corresponding to them, agreeably to the industry which they may establish.

Art. 5. The measurement of land shall be the following: Establishing the *vara* at three geometrical feet, a straight line of five thousand *varas* shall be a league; a square, each of whose sides shall be one league, shall be called a *Sitio;* and this shall be the unity of counting one, two, or more *Sitios; five Sitios shall compose one Hacienda.*

Art. 6. In the distribution made by government, of lands to the colonists for the formation of villages, towns, cities and provinces, a distinction shall be made between grazing lands, destined for

the raising of stock, and lands suitable for farming or planting, on account of the facility of irrigation.

Art. 7. One *Labor* shall be composed of one million square *varas*, that is to say, one thousand *varas* on each side, which measurement shall be the unity for counting one, two, or more *Labors*. These *Labors* can be divided into halves and quarters, but not less.

Art. 8. To the colonists whose occupation is farming, there can not be given less than one *Labor*, and those whose occupation is stock raising, there can not be given less than one *Sitio*.

Art. 9. The *government, of itself, or by means of the authorities authorized for that purpose*, can augment said portions of lands as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

Art. 15. As soon as a sufficient number of families may be united to form one or more towns, their local government shall be regulated, and the constitutional *Ayuntamientos* and other legal establishments formed, in conformity with the laws.

Art. 17. In the distribution of lands for settlement among the different provinces, the government shall take care, that the colonists shall be located in those which it may consider the most important to settle. As a general rule, the colonists who arrive first shall have the preference in the selection of land.

Art. 19. To each *Empresario*, who introduces and establishes families in any of the provinces designated for colonization, *there shall be granted at the rate of three Haciendas and two Labors, for each two hundred families so introduced by him*, but he will lose the right of property over said lands, *should he not have populated and cultivated them, in twelve years*

from the date of the concession. The *premium can not exceed* nine *Haciendas* and six *Labors*, whatever may be the number of families he introduces.

Art. 20. At the end of twenty years the proprietors of the lands, acquired in virtue of the foregoing article, must alienate two-thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one-third part.

Art. 23. If, after two years from the date of the concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; in which case, the respective *Ayuntamiento* can grant it to another.

Art. 24. During the first six years from the date of the concession, the colonists shall not pay tithes, duties on their produce, nor any contribution under whatever name it may be called.

Art. 25. The next six years from the same date, they shall pay half tithes, and the half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time, they shall in all things relating to taxes and contributions, be placed on the same footing with the other citizens.

Art. 26. All the instruments of husbandry, machinery, and other utensils that are introduced by the colonists for their use, at the time of their coming to the empire, shall be free, as also the merchandise introduced by each family, to the amount of two thousand dollars.

Art. 27. All foreigners who come to establish themselves in the empire, shall be *considered as naturalized*, should they exercise any useful profession or industry, by which, at the end of three years, they have a capital to support themselves with

decency, and are married. Those who with the foregoing qualifications marry Mexicans, will acquire particular merit for the obtaining letters of citizenship.

Art. 28. Congress will grant *letters of citizenship* to those who solicit them in conformity with the constitution of the empire.

Iturbide abdicated March 20, 1823, and the acts of his Government were declared illegal and void, and his banishment ordered, by a decree of the constituent congress of Mexico of April 8, 1823, as follows:

DECREE OF APRIL 8TH, 1823.

(Defendants' Exhibit No. 7.)

The Sovereign Constituent Congress of Mexico, in the session of yesterday, decreed the following:

1. That the coronation of Agustin de Iturbide being an *act of violence and of force, and void in law*, there is no occasion to discuss the abdication he makes of the crown.

2. Consequently, it also declares as void the hereditary succession and the titles that have emanated from the coronation; and that *all the acts of the late government, from the 19th of May to the 29th of March last, are illegal*, but subject to revision by the present Congress for their confirmation or revocation.

3. The supreme executive authority will cause the prompt departure of Agustin de Iturbide from the territory of the Nation.

(Reynold's Spanish and Mexican Law, p. 107.)

By another decree, dated April 11, 1823, the colonization law was suspended and provisions made for acting upon grants made under it.

DECREE OF APRIL 11TH, 1823.

(Defendants' Exhibit No. 8.)

In this (order) the government is instructed, if it does not find it inexpedient, to accede to the application of Stephen Austin to confirm his concession to establish 300 families in Texas; *to act upon other applications of like nature, and to suspend until a new resolution the colonization law enacted by the Instituent Council (Junta).*

(Reynold's Spanish and Mexican Law, 108.)

The following chronology will be found useful as the argument proceeds:

Colonization law passed	Jan. 4, 1823
Overthrow of Iturbide	*Mar. 19, 1823*
Banished, and acts under him declared illegal	Apr. 8, 1823
Acts of Ayuntamiento of El Paso *in re.* Heath Grant concluded	Apr. 25, 1823
Disapproval by provincial deputation	June 19, 1823
Banishment of Iturbide	May 11, 1823
Return and execution of Iturbide	July 19, 1824
Heath's colony alleged to have been organized in Missouri, brought to El Paso *via* Soto la Marina, settled on the grant, and driven away from the grant and out of the country, *on account of the overthrow of Iturbide's government* and the undoing of all its acts, *in the years*	*1824* or *1825*
First assertion of claim by Heath or his heirs	*1892*

ARGUMENT

I.

NO FINAL GRANT OF THE LAND DESCRIBED WAS ATTEMPTED BY THE AYUNTAMIENTO.

(*a*) *It was an empresario contract, with conditions annexed which formed the consideration for the grant.*

The proposal and acceptance together formed the contract. Both were professedly and in terms made in virtue of, and in attempted compliance with, the new colonization law, which had been passed January 4, 1823. The execution of this law was, as the *Ayuntamiento* stated in its report to the governor, "new in these countries," and it is not strange that it was not followed with technical accuracy. Nevertheless, an inspection of the record of proceedings leaves no doubt what the intention was, both of Heath and the El Paso authorities.

The application was unquestionably made under article 3 of the law as an *empresario*, and was so understood and acted upon by the *Ayuntamiento*.

The proposals of Heath, to "bring for the settlement of the land * * * thirty families," embracing artisans of various callings, to establish stores of merchandise, erect mills for the manufacture of cotton, cloth, and gunpowder, are set forth as the inducement for the concession, and are in conformity with article 3. The requests

in the petition that "the said *settlement* be annexed to the parish of this jurisdiction;" that "your petitioner be designated as the person for the distribution of the said lands," and that the "pastures and woodlands be common," are consistent with the attitude of a contractor for colonization, and inconsistent with that of a man asking for a grant in fee simple for himself alone. If Heath was to receive the land in severalty as an individual colonist, there was no occasion to ask for power to distribute land to settlers thereon.

Various other allusions throughout the proceedings show that the main thing in contemplation was the introduction of new settlers and families; for example the following:

"*The proposals made by the new settler* for the benefit of the town" were admitted, and he was reminded that the "new *families he shall bring* must be honest and belong to the Roman Catholic religion;" the convocation of the residents of the vicinage on April 13, to ascertain whether they were satisfied with the *new neighbors*, who contemplated joining the jurisdiction (R., 159); the protest of Agapito Albo in relation to the "*families* which Juan Gid proposes to *establish* at the Bracito" on the ground that the farms and machinery offered by the "*new settlers*" might become prejudicial to the old inhabitants; the declaration in response to this of the understanding "by himself and the families with him" (R., 163); the statement in the proceedings of April 25 (R., 168), "that the land of the Bracito was '*granted for settlement to Juan Gid.*'"

This court, in the Maxwell land-grant case (121 U. S., 325, 363), attached great importance to the use of similar expressions in the *expediente* of that grant. The court said:

> It would seem from these orders, decrees, and resolutions of the governor and departmental assembly of the Territory of New Mexico that they must have supposed that the grant was intended for families to be settled upon, and was not one of those in which an individual could only receive a definite quantity of land for his own settlement and cultivation; there would have been little cause for the frequent use of the words "colony" and "colonization," and such expressions as "settling families" in the colony, unless such was the view the granting power took of the nature of the grant.

The fact that the *ayuntamiento* in their communication to the governor refer to the fourth article does not change the character of the transaction; because all their acts indicate, in spite of this, that they were dealing with an *empresario*.

Heath had applied for the grant the previous December, before the colonization law had passed. He was no doubt moved to this by the example of Austin and other Americans, who went to Mexico in 1822, immediately after her independence was established, and solicited concessions for the colonization of families, under *empresario* contracts. (1 Kennedy's Texas, pp. 308–326.)

His first petition, in December, 1822, was addressed to the Emperor, and the proposals therein contained were framed with express reference to the settlement of a colony within Mexican territory. He could have had

no idea of obtaining a grant of land as an individual colonist, unaccompanied by other families, because there was then no warrant, either in law or custom, for such a grant to a foreigner. Without the inducement he held out as consideration for the concession, Heath could not have expected any recognition by the Mexican Government. His second petition was only confirmatory of the first, and shows that the intention was unchanged.

The transaction was of the same nature as that described in *Glen* v. *United States* (13 How., 256, 259), where the court considered the effect of a contract, the moving and only consideration for which was the proposal to introduce colonists and establish manufactures. We cite it as a complete answer to appellant's theory of the absolute character of this grant:

> One Clamorgan petitioned the proper authorities of the province of Louisiana for a large grant on which to establish a manufactory of cordage, and to colonize a large number of persons from Canada who might cultivate hemp. The grant, which was made upon this petition, referred to the above considerations, and contained the following words: "In virtue of this, I concede to him, for him and his heirs, the tract of land which he solicits, in the place and with the same boundaries that he prays for, provided that there is no injury to anyone;" and then refers to a survey which the grantee is expected to make, and the families "which he is bound to cause to come from Canada."

The fact of the grant was thus stated by the court in its opinion, page 256:

> The country was vacant and greatly needed population, which could only be drawn from abroad;

> and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the land; that he would introduce cultivators of hemp and artisans skilled in the manufacture of cordage; and would grow hemp and make cordage to an extent so large as to be of national consequence. On the faith of these promises the grant was made.

Upon these papers alone, as in the present case, a title in fee to the land referred to was claimed, and there as here the case of *Arredondo* (6 Peters, 691) was relied upon in support of the contention. But the court readily distinguished between the two cases, as follows:

> But it is insisted that, forasmuch as a title vested in Clamorgan by the grant to him, even admitting that it was incumbered with conditions, still, as their performance was to happen subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by Government for that especial purpose; nor could want of performance be set up as a defense in this suit.
>
> If the premises assumed were true the conclusions would necessarily follow; and Arredondo's Case is relied on in support of this position and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish Government could confer. * * * The subsequent condition there relied on to annul the grant was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held, and the grantee discharged from its performance. But in Clamorgan's Case the conditions to occupy and cultivate were precedent conditions. They addressed themselves to the governor-general, and their performance was required in advance. Before any right existed in

> Clamorgan to apply for a complete title, or even to have a public survey preparatory to such application, he was bound by his contract to establish his colony on the land, and, furthermore, to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish Government (p. 258). * * * A promise of performance was the sole ground on which the Spanish commandant made the concession, and actual performance was to be the consideration on which a complete title could issue (p. 259).

The concession to Heath was, therefore, a mere executory contract to concede to him what he would be entitled to under the law of January 4, 1823, upon the inducement and consideration that he was to introduce at least thirty families.

(*b*) *The expediente nowhere distinctly purports to grant the land in fee.*

The use of the word "grant" where it occurs and the delivery of possession do not prove it, because both must be taken with the context and in connection with the whole record. The land was to be "assigned to him;" "given to him;" "granted;" "granted for settlement." He was to "be given an *hacienda*" in the same land he has already asked for. He was to be "entrusted with the distribution." He was given "lawful possession" of an "*hacienda.*" And by the declaration of the Ayuntamiento on April 22, after the proceeding was concluded, the land "composed an *hacienda*, according to article 5th of the Colonization Plan; which land was granted by this *Ayuntamiento* to Don Juan Gid *for the purpose of settlement.*"

Under the fifth article the unit of quantity was the *sitio*, which was one square league; five of these composed one *hacienda*.

A *labor* was equal to 177 acres.

A *sitio* was equal to 4,428 acres.

An *hacienda* was equal to 22,140 acres.

The tract designated for Heath was five leagues square, equal to five *haciendas*. Under the law, for the introduction of *two hundred families*, he could only receive *three haciendas* and *two labors*. It is not to be supposed that the *Ayuntamiento*, while professing to act under this very law, would undertake to give him, as a single colonist, nearly double the quantity of land he could obtain as an *empresario* for the settlement of two hundred families.

The *Ayuntamiento* seems to have had the impression, and Heath as well, that the land to be granted for settlement was limited to the quantities mentioned in article 19, both for *empresario* and his settlers. In his petition he asks that "the land which may be assigned to him be at least enough for an *hacienda*," and that the "*designation* be made on both sides of El Bracito, because the land being broken, it is necessary to leave out portions of it," thus indicating clearly that he did not expect to acquire title to the whole tract designated. The *Ayuntamiento* calls the land which was granted to him "for settlement" an *hacienda*, under the 5th article, "being five leagues in each direction." They evidently misunderstood the 5th article, and supposed that the *hacienda* therein defined was five leagues square instead of five square leagues.

Whatever may be found to be the character of the concession attempted to be made, the extent of it was thus expressly limited to *one hacienda*, as defined in the fifth article, within the territory described in the act of possession.

Besides this, it was stipulated in the act of the *Ayuntamiento* accepting his proposals that Juan Gid *and his families* should "only have the *hacienda*, the property of the lands for farming, manufactures, and machines, but *not in the natural pastures and woods, which shall be common*, etc." (R., 169 and 170.) Thus a portion—how much remained undetermined—was expressly excluded from whatever was to be granted.

(c) *It was expressly made subject to the determination of the governor and provincial deputation.*

This is distinctly stated in the act accepting his proposals (R., 168) and in the letter of the *Ayuntamiento* transmitting a copy of the proceedings to the governor, wherein they say, "this corporation stating, nevertheless, that if it has erred in anything *the concession has been made subject to the superior determination.*" (R., 172.)

Such approval was, therefore, a *condition precedent* to the vesting of any right or title whatever, whether executory or executed.

Whatever may have been their powers or duties, the *Ayuntamiento* were not bound to make this grant because Heath petitioned for it. They could refuse it, or attach any qualifications they chose—even an impossible condition—if precedent. It is idle to say that the *Ayuntamiento* had no power to annex such a condition. That

begs the whole question. Unless Heath came with an order from the executive (without which they had under the law no right to act at all) they could have rejected his proposals altogether; *a fortiori* they could accept them conditionally.

The only paper claimants can produce as evidence of a grant is the one which shows this condition expressly annexed. The copy produced is the one from the archives at Santa Fe, which is the identical copy sent to the governor subject to approval.

It is a remarkable and significant fact that nobody seems to have seen any title papers in possession of Heath or his heirs.

Three copies of the *expediente* were made:

1. The original in the archives as a perpetual testimony (the *protocol*).

2. A certified copy to be sent to the governor of the province.

3. Another copy of the same kind for the party in interest, for his protection (the *testimonio*). (Proceedings of April 25, R., 167.)

Either the first or third of these, according to Mexican law and the decisions of the American courts, would be admissible as original evidence. The second, being neither the archive itself nor the copy given out for purpose of evidence in favor of the grantee, but made for an entirely different purpose, is only secondary evidence and not admissible without proof of the loss of one or both the others. We contend that it can not be received as evidence in this case, because no foundation has been laid for its introduction.

But, aside from the technical objection, the fact that this Santa Fe copy is the only evidence claimants can produce tells powerfully against their whole case. If it is admissible at all, it must be taken *as it is*, and for what it purports to be, with all its qualifications and conditions attached. If claimant is entitled to use it at all, he must take it with its burdens and infirmities, and he can not select out the parts that suit him and ignore the rest. This fact is fatal to claimants' case, also, for a still stronger reason, which will be alluded to presently.

II.

THE CONCESSION WAS DISAPPROVED BY THE PROVINCIAL DEPUTATION, AS IN VIOLATION OF LAW.

(*a*) *By this the whole action of the Ayuntamiento became null and void; and the concession became void ab initio.*

They were informed that their procedure was "violent and mistaken;" that it was "in violation of the same law" under which they proposed to act; that the colonization law "which was the moving cause in the concession of the Bracito land to said Heath" had been repealed; and they were instructed to notify Heath "that the possession which has been given to him at the Bracito, was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed."

This was communicated to the *Ayuntamiento* by letter of June 19, 1823, which comes from the archives at El Paso of that year. It shows that the repeal of the Iturbide colonization law, which was done on April 8 (before the El Paso concession was concluded), was known at

Santa Fe at least as early as June, 1823, and must necessarily have been known at El Paso at an earlier date, because all communication between the capital and Santa Fe was through El Paso.

(*b*) *This accounts for the nonproduction of the original or the testimonio of the concession.*

In view of their own doubts as to the proper mode of executing the new law, and the care taken by the *Ayuntamiento* to make their action subject to the determination of their superiors, it is not probable that they would deliver to the grantee the *testimonio* at once. It was doubtless withheld, awaiting the decision of the Government; and upon this being received, and found to be adverse, the whole proceeding was probably canceled, and the *testimonio* never delivered to Heath. It appears that the archives for the year 1823 are preserved, and are in El Paso. (See the certificate in this case to the letter from the provincial deputation; also the record in the case of *Lerma* v. *Stevenson*, 40 Fed. Rep., p. 356, cited in claimants' brief.)

(*c*) *The action of the provincial deputation was a complete adjudication, by competent authority, of the fact that the grant was in violation of law, and void.*

No Mexican official, short of the supreme government, would have ventured to sustain or recognize the grant after that decision. No Mexican court would have admitted the proceedings relating to it as evidence of title.

Such adjudication was binding on the Mexican authorities then, and is binding on us seventy years after. This, especially when taken in connection with the repeal of

the acts of the Iturbide government, brings this claim within the class mentioned in section 13 of the act creating the Court of Private Land Claims, which the court is not authorized to confirm. (See law and authorities cited under head VI.)

III.

THE LAW OF JANUARY 4, 1823, CONFERRED NO POWER UPON THE AYUNTAMIENTO TO MAKE A GRANT IN THE FIRST INSTANCE TO AN INDIVIDUAL COLONIST.

The colonization law of 1823 treats exclusively of the granting of lands to foreigners. The essence of the whole scheme is found in the second article, which declares that, "To facilitate their establishment, *the executive will distribute* lands to them, under the conditions and terms herein expressed."

The grants contemplated by this law were of two kinds:

1. To *empresarios* for colonizing families. (Article 3.)

2. To families who should come by themselves, *i. e.*, who were not included in a contract. (Article 4.)

As to the lands to be assigned to *empresarios*, they were to be previously contracted for and designated by the executive itself. When families emigrated not included in a contract, the respective *Ayuntamientos* were to designate lands to them for occupancy, according to the industry which they were going to undertake, in conformity with the instructions of the executive.

There is a slight difference in the phraseology of the different translations of article 4, but it is immaterial which one is adopted. It is perfectly clear from either

one, or from the original Spanish, that no distribution of lands to families not included in a contract could be made by the *Ayuntamiento* except under instructions of the executive, either brought directly by the families applying or received by the *Ayuntamiento* independently. Without such instructions or orders, the *Ayuntamiento* was without authority to act.

In either case, therefore, whether the grant was to be to an *empresario* for colonizing many families or to families who came in their own right, an order from the executive was a prerequisite without which the *Ayuntamiento* was powerless.

The authority of the *Ayuntamiento*, in any event, was limited to "designating" the lands to families who came by themselves in conformity with the orders which might have been received from the executive.

To "designate," according to Webster, means:

> 1. To mark out and make known; to point out; to name; to show; to distinguish by marks or description; to specify—as to *designate* the boundaries of a country.
>
> 2. To indicate or set apart for a purpose or duty; with *to* or *for*.

Because the *Ayuntamiento* assumed to act under the fourth article, and to designate lands to Heath, counsel for claimants say it must be presumed that instructions had been received by that body to do so, on the doctrine that everything done by those in authority is presumed to be done rightly. If so, the same presumption extends to everything else they did in the matter, and this argument is fatal to their whole case. For the presumption

would be equally strong that the *Ayuntamiento* referred the grant to the provincial deputation for its approval and directions, in pursuance of instructions to that effect from the executive, and that this was the only instruction they had, because they say in their communication that the law is new, and they solicit the direction of the deputation.

This is not a case where presumption can be relied upon to supply authority for making the concession, for two reasons:

1. The *Ayuntamientos* were inferior bodies of mere local jurisdiction and limited authority. Whatever authority they had was conferred upon them by statute, and as they were municipal bodies they could take and exercise only such power as was conferred upon them by the will of the sovereign, as expressed in the laws creating them, they could exercise none other. (*Branham* v. *San Jose*, 24 Calif., 585.)

2. For reasons hereafter more fully stated, all presumptions in this case relative to authority or facts not shown by the record to exist, are the other way.

But there is no occasion for indulging in presumption or conjecture as to this matter. It appears clearly by the communication of the *Ayuntamiento* to the governor that that body had proceeded in this case without instructions and without municipal ordinances regulating the distribution of land, and for that reason referred its entire proceedings to the government of the province for approval, and that it might "order what may be just and convenient to remove uncertainties, and to proceed with certainty in every matter."

Counsel for claimants deny that Heath was a contractor; they insist that the grant was made to him individually and exclusively as a "colonist," and they refer to articles 8 and 9 of the law of 1823 as furnishing authority for granting to him an unlimited quantity of land, which read:

> Art. 8. To the colonists whose occupation is farming there can not be given less than one *labor*, and those whose occupation is stock raising there can not be given less than one *sitio*.
>
> Art. 9. The government, of itself, or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

It is in these articles that counsel profess to find an explanation of the action of the *Ayuntamiento* in giving to the "colonist" Heath, who petitioned *neither as a farmer or stock raiser*, a concession of some one hundred and thirty thousand acres of land, or more than twice what he could have received as an *empresario*, if he had brought in the full two hundred families as provided in the law.

This contention is founded upon a complete misconception of the purpose of the eighth and ninth articles. They necessarily refer back to article 6, and must be read in connection with it. They apply only to the distribution of lands *by the Government*, to colonists for the formation of towns, etc., in which a distinction is to be made between lands for farming and for stock raising. The object of fixing a minimum quantity of land to be

given to colonists of these two avocations, was doubtless to protect them against the *empresarios*, who in order to monopolize the best lands in a designated district for their own premium, might wish to restrict the colonists to an insufficient quantity. This would be consistent with the idea of the ninth article, that the Government or its authorized agent, might augment these quantities.

But in any event, the augmentation could only be by the Government itself, or some authority "authorized *for that purpose*," which was not the *Ayuntamiento*. And to "augment" does not mean to grant in the first instance. This is clearly explained by the supreme court of Texas in *Harlan* v. *Haynie* (9 Texas, 459, 463), when construing a similar provision in the colonization law of Coahuila and Texas, of 1825, as follows:

> But what was the character of the bounty intended to be bestowed on colonists? The words of the article are: "It appertains to the Government to augment the quantity indicated," etc., "according to the family, industry and activity of the colonists." Now, what are we to understand by augmentation? Is it an original concession of some certain quantity, or an increase allowed in addition to a quantity already given? Webster defines augment to mean "an enlargement by addition, to enlarge in size, to swell." And so I understand it. Then I do not take the article 17 as authorizing an original grant of land to a colonist. Other articles apply to that description of grants, and not the seventeenth. It, in my judgment, must necessarily be understood as assuming that the colonists claiming the benefits of its provisions had already obtained land. It does not, it will be seen, warrant

concessions to colonists as mere colonists, but to colonists who, in consequence of either their family, industry, or activity, are entitled to greater consideration.

The *Lerma* Case, in 40 Fed. Rep., relied on by plaintiffs, proves nothing. It was expressly made subject to the approval of the departmental assembly, and approved by it in the first instance. Judge Maxey held the grant valid, because the case was before him on agreed statement of facts, by which the validity of the grant was expressly stipulated.

IV.

SUBSEQUENT GRANTS OF SAME LAND BY MEXICO.

The subsequent granting by Mexico of part of the same lands to others, by several distinct grants, was further evidence that Heath's concession was regarded as illegal and void; it amounted to a declaration of that fact by the Government, and was a resumption of the lands. The facts on this subject will be mentioned later on.

V.

THE LAW UNDER WHICH THE GRANT WAS ATTEMPTED WAS DECLARED INVALID BY THE MEXICAN GOVERNMENT APRIL 8, 1823, AFTER THE OVERTHROW OF ITURBIDE.

The Emperor abdicated March 19, 1823, and the constituent congress, which Iturbide had undertaken to dissolve, was reconvened; on April 8 it decreed that the coronation of Iturbide was an act of violence and force, and was null, and all acts of the last government, from

May 19, 1822, to May 29, 1823, were illegal and subject to be revised, confirmed, or revoked by the government then established; and by the decree of April 11, 1823, it was further decreed by the sovereign congress that thereafter the colonization law of the Junta Instituyente should be suspended until a new resolution on the subject. (Reynolds's Spanish and Mexican Law, pp. 107, 108.)

This was a *sovereign declaration* by the Government, from which there was no appeal. Mexico and her citizens were bound by it.

It is a general and acknowledged principle of law that the political power of a government may affirm or disaffirm the acts of a preceding government; and this is undoubtedly true under all changes of sovereignty which may occur, the successor not being bound by the incipient or imperfect acts of a preceding government any further than such government would be by its own acts. (*Paschal* v. *Dangerfield*, 37 Tex., 273; *Jones* v. *Borden*, 3 Tex., 410.)

In the former case the court says (p. 301):

> In the case of an inchoate or incipient title there must be some additional exercise of the granting power before the fee will pass. Such title does not imply ownership either against the sovereign or against the individuals, and such a title emanating from a former government, and which was never recognized by the existing one, forms no foundation for an action.

The constitution of the republic of Texas declared that no future survey or title should be valid unless

sanctioned by the convention or some future law of the congress of the republic.

The supreme court of Texas says of this:

> This is an authoritative declaration of the acknowledged general principle that the primary control over the public domain belongs to the legislative branch of the Government, and that the obligation to respect and complete the incipient titles emanating from a former sovereignty rests exclusively upon the political authority. By this they may be altogether disavowed, or they may be recognized with or without conditions or restrictions. (*Paschal* v. *Perez*, 7 Tex., 348–364.)

According to the principles of the Spanish and Mexican jurisprudence, the construction and interpretation of the laws was vested in the legislature, and we find the principle embodied in the federal constitution of 1824 (article 165), and in that of the State of Coahuila and Texas (articles 97–172). In Spanish jurisprudence the interpretation of laws is divided into the authentic, the customary, and the doctrinal. The authentic is that given by the legislator himself, who alone has the authority to resolve the doubts and fix the sense of words, and whose decision is obligatory on citizens and tribunals, and must be obeyed both within and without the courts of justice. (*Houston* v. *Robertson*, 3 Tex., 26.)

The constituent congress of Mexico, representing the Government of Mexico recognized by the United States (Poinsett's notes, appendix, 87), declared the law under which this grant was made to have been illegally passed, and annulled it. This decision of the proper authority

of the Mexican Government is binding upon our Government.

A Mexican who was injured by it could only appeal to the *favor* of his Government.

A United States citizen only through diplomatic representations, as an international question.

(*a*) *It is therefore not such a claim as the Court of Private Land Claims has authority to confirm.*

By the act organizing that court, no claim can be confirmed unless *valid* under Mexico, or which the United States by treaty is bound to recognize. Section 13 of the act contains the following provision:

> First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the states of the republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect.

This court has several times declared that—

> Under the act of March 3, 1891, it must appear in order to the confirmation of a grant by the Court of Private Land Claims, not only that the title was lawfully and regularly derived, but that, if the grant was not complete and perfect, the claimant could

by right, and not by grace, have demanded that it should be made perfect by the former Government, had the territory not been acquired by the United States.

Ainsa v. *United States*, 161 U. S., 223.
United States v. *Santa Fe*, 165 U. S., 715.
United States v. *Sandoval*, 167 U. S., 293.
Bergere et al. v. *United States* (October Term, 1897).

In these cases the construction of the act establishing the Court of Private Land Claims, and the limitations on the power of the court in administering it, are announced and repeated as a settled rule:

> An inchoate claim, which could not have been asserted as an absolute right against the Government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims, 26 Stat., 854, and, therefore, is beyond the reach of judicial cognizance. The duty of protecting imperfect rights of property under treaties such as those by which the territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the Government.

Can it be pretended that after the act itself had been declared illegal by the superior authority to which it was referred, and the law under which it was made declared invalid by the sovereign power, such a title could on any principle be considered *valid* under the government thus denouncing it, or one which a subsequent government was bound by treaty to recognize?

(*b*) *The claim is also excluded under the act of March 3, 1891, for nonperformance of conditions.*

The eighth subdivision of section 13 of the act provides that:

> No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition or requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land.

It is admitted that there were conditions annexed to this grant, but counsel for claimants insist that they were conditions subsequent, and that performance of them was excused by reason of various causes alleged. Such causes, if true, might create an equity in favor of the claimants; but for its recognition, under the decisions of this court already cited, recourse must be had to the political department of the government. It will be seen under the next head that the political department of this government has distinctly refused to recognize this class of grants.

THIS WAS THE VERY KIND OF A GRANT WHICH THE UNITED STATES REFUSED TO RECOGNIZE IN THE TREATY OF GUADALUPE HIDALGO.

The tenth article of this treaty, as originally negotiated, provided for the confirmation of colonization contracts which were unperformed. This was stricken out by the United States Senate from the treaty as ratified and the Mexican Government informed that under no circumstances would the American Government assent to it.

This is fully explained and decided in *Inter State Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S., 569.

That case is also decisive of almost every point now before us. There was a grant, in consideration of settlement of two hundred families, for a perfectly described tract of land; allegation of possession given, and settlement of part of the families, and prevention of settlement of the remainder by reason of the Texan revolution—all of which stood admitted by demurrer. Yet this court found no difficulty in deciding that no title had vested.

So Heath's concession was *a grant for settlement* of a colony on condition. Claimants' remarkable evidence and labored argument to prove performance of or discharge from the conditions show that they considered it so.

A fair consideration of the evidence presented to show the settlement of a colony on the land by Heath leaves upon the mind the greatest doubt whether anything of the kind ever occurred.

Presumably Heath was informed of the disapproval and annulment of his concession, as the letter of the provincial deputation directed that he should be. Knowing from the proceedings of the *Ayuntamiento* that their action was made subject to approval, and that a copy of it had been transmitted to the governor for that purpose, it is to be presumed that he awaited the decision upon such reference before risking his entire fortune in an attempt to plant a colony upon land to which he might never obtain title. It is incredible that an expedition, such as is described in the testimony, could have been taken through the interior of Mexico in 1824, settled

near El Paso, and forcibly driven away, without some mention of it being made in the history of the times, and without leaving some memorial or tradition which would have come down to the knowledge of prominent and intelligent old inhabitants of that vicinity. The fact itself is directly contradicted by witnesses of this class, who swear they never heard of it. There is something suspicious about the whole story, and the attempt of the witnesses to corroborate it by reference to the fall of Iturbide does not help the matter at all. It amounts rather to a case of *felo-de-se*.

The repeal of the colonization law in April, 1823, and abrogation of all the acts of Iturbide's government were known in Santa Fe on the 19th of June, 1823. The banishment of Iturbide occurred about the same time. If Heath started from El Paso, either immediately after the action by the *Ayuntamiento* in April or after the receipt of the action of the deputation in July, to go to the United States by sea—the only feasible way then—he must have known of the fall of the Iturbide government before he left Mexico. Yet, according to the witnesses for claimants—who chant the refrain, with singular unison of idea and expression—all of Heath's trouble came on him *after* making a settlement with his colony in 1824, *on account of* the overthrow of Iturbide's government and repeal of its acts, *which had occurred a year before*.

VII.

HEATH WAS NOT WITHOUT REMEDY, IF HE HAD A VALID CLAIM.

1. Under the act of April 11, 1823, by which the Mexican Government authorized the revalidation of such grants on application and proper showing. His case was similar to Austin's. And if it was entitled to the favorable consideration of the Government, he could have obtained by means of this law a confirmation of it by the supreme government, as Austin in fact did. There is no allegation in the petition or proof adduced that Heath ever attempted to avail himself of the privilege thus extended.

2. By the convention of April 11, 1839, for adjustment of claims against Mexico. (8 Statutes at Large, p. 526.)

3. Under Articles XIV and XV of Treaty of Guadelupe Hidalgo. (9 Statutes at Large, p. 933.)

Heath was a citizen of the United States.

(*a*) Citizenship once established is presumed to continue.

(*b*) His own declarations in his petitions assert it.

(*c*) There is no proof to the contrary.

(*d*) Mexican citizenship by naturalization could only be acquired under the law of 1823, articles 27 and 28.

He would therefore be entitled to the benefit of these treaty stipulations. And if the grant had been an absolute one, as claimed, he could have taken possession of it after the cession of the country to the United States, in 1848.

VIII.

IF VALID AT ALL, THE CONCESSION WAS LIMITED TO ONE HACIENDA OF 22,140 ACRES.

As pointed out before, the acts of the *Ayuntamiento* expressly declared that the land to be given to Heath constituted "*an hacienda according to article 5 of the colonization plan.*" This would be five *sitios*, a *sitio* being "a square, each of whose sides shall be one league," or five square leagues in all, amounting to 22,140 acres. The area claimed is stated in the brief of counsel to be about 130,000 acres, although the dimensions stated in the act of possession would make just twenty-five square leagues, or five *haciendas*, equal to 110,720 acres.

Heath's concession, therefore, if anything, is a float for 22,140 acres, to be located within a larger area, within whose boundaries a number of other grants have been subsequently made and definitely located by the Mexican authorities, one of which has been confirmed by the Congress of the United States. A surplus remains undisposed of, sufficient in quantity to satisfy the float.

This would bring the case within the rule laid down by this court in *The United States* v. *McLaughlin* (127 U. S., 128), viz, that the locating of such subsequent definite grants amounted to an exercise of the power of the Government to locate floating grants, and their title is superior to that of the float.

We quote from that case as follows:

> It is in the option of the Government (not of the grantee) to locate the quantity granted; and, of

course, a grant by the Government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the Government has the right to say where it shall be located, it certainly has the right to say where it shall not be located; and if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten leagues, the Government may dispose of seventy leagues, without doing any wrong to the original grantee. This was the Mexican law, and, of course, it is our law. (*United States* v. *Armijo*, 5 Wall., 444, 449.) In practice, it is true, our authorities, in administering the public lands, have generally allowed the original grantee to make his own selection of the point where he will have his quantity located, provided he has it all located together in one tract. But this is a matter of favor and not a matter of right. If this were not so, the right of way granted for the railroads by Congress would be subject to question and litigation. There can not be any doubt, however, of the validity of these grants. The cases which show the law on this subject are numerous; it is only necessary to refer to a few of them. The following may be consulted: *Fremont* v. *United States*, 17 How., 542, 558, 565; *United States* v. *Armijo*, 5 Wall., 414; *Hornsby* v. *United States*, 10 Wall., 224, 234, 235; *Henshaw* v. *Bissell*, 18 Wall., 255, 266, 267; *Miller* v. *Dale*, 92 U. S., 473, 476, 477; *Van Reynegan* v. *Bolton*, 95 U. S., 33, 36.

The act of Congress of March 3, 1891, constituting the Court of Private Land Claims, provides, by its seventh section that: "The court shall in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed." Therefore, if the court should confirm to the petitioners the hacienda granted by the *Ayuntamiento* of El Paso to Heath, it must be located within the outboundaries, upon lands not subsequently granted or otherwise disposed of by the Mexican Government or that of the United States.

IX.

THE CLAIM IS EXTINGUISHED BY LAPSE OF TIME.

The great length of time for which this claim has remained unasserted not only places it, and all the evidence adduced to support it, under suspicion, but, when considered in connection with the other facts in the record, it will solve every doubt that might by any possibility remain and will constitute a complete defense to the claim.

This defense does not arise under statutes of limitation; and decisions touching the time when such statutes begin to run have nothing to do with the case. It exists outside of and independent of such statutes.

There are certain rules, founded upon the general experience and observation of mankind, by which the conduct of men in their business affairs is tested. Tried by these rules, the deductions drawn from the action or nonaction of men under given circumstances and conditions are so conclusive and irresistible that they will often outweigh even the testimony of witnesses under oath.

Men having large and valuable properties which they believe themselves to own, do not, unless under some disability, leave their property in the quiet enjoyment of others for long periods of time, without objection or some assertion of their rights. "Every person," says Chancellor Kent, "is bound to take care of his own rights, and to vindicate them in due season. This is a sound and salutary principle of law." (1 Johns. Cas., 502.) Lord Erskine, in an opinion often commended by American judges, stated the matter in this wise:

> The presumption from length of time stands upon a clear principle, built upon reason, the nature and character of men, and the result of human experience. A man will naturally enjoy or claim what belongs to him. (*Hillary* v. *Walker*, 12 Vesey, jr., 265.)

The operation of this presumption is by way of a rule of evidence, which, resting upon the weakness and infirmity of all human tribunals when judging of matters of great antiquity, raises up a presumption which takes the place not only of facts, records, or written muniments, but even of the belief in their actual existence.

Therefore, when a series of events, actions, and conditions is so long and long continued that according to the common observation of men they can not be reconciled with the fact or claim asserted, the law will infer the existence of such other facts as might or should have existed in order to make it agree with the results of such observation.

This presumption does not rest at all on the belief that the necessary fact actually existed—though generally

such belief follows irresistibly—but it rests upon the necessity of having, in regard to matters which have become clouded by the lapse of time, some general principle to take the place of individual belief or disbelief.

Therefore it is that from certain combinations of events courts will presume, and presume conclusively, as a rule of evidence often superior to the positive testimony of witnesses, the existence of such facts as are necessary to make the known conduct of the parties agree with the established results of human experience.

Let us apply this principle to the facts of this case:

The last pretended act of Heath was in 1824 or 1825.
This claim was filed..... 1892

Lapse of time..... 67 years.

John G. Heath lived twenty-six years after returning to the United States. There is nothing to indicate that he or his heirs were persons of weak mind, imbecile, or *non compotes mentis*. On the contrary, all the evidence shows that he was a strong, prominent, and wealthy man, of unusual force of character.

"He was a very shrewd, intelligent man, scarcely had an equal, if any, in the State. Was a *leader of men all his life*. Was a lawyer, judge of courts for many years. Member of constitutional convention and of the legislature." (Witness Woodruff; and Mexico certificates, Rec. p. 125.)

He was the last man in the world to quietly give up what belonged to him and let others enjoy it, without protest or objection.

During his lifetime, in 1846, the land passed from Mexico to United States.

If it was his, he could then go and take possession of it under protection of United States.

But though he talked about it with returning soldiers, he made no claim, notwithstanding he lived five or six years afterwards.

New Mexico was occupied by Missourians under General Kearny in 1846, and most of the early commerce and laws were derived from Missouri. So it would have been natural for Heath, a prominent Missourian, to go and assert his claim, if he had any.

Heath left several children:

1. Robert J., born in 1815; married first time, 1844; married second time, 1865; corresponded with lawyers, 1881; moved to El Paso to look up claim, and then abandoned it and dropped out, 1882; died in San Antonio, 1885 or 1886.
2. Joseph Heath, died in 1855.
3. Margaret Heath, died in 1857 or 1858; married James Edsall, who died before her.
4. Harriet Heath, died in 1856; married ——— Dwyer, who died before her.
5. Eliza Heath, died in 1863.

Yet, during all this period of sixty-seven years not a single act can be pointed out in the way of assertion of right or title to this land by any of these parties.

What, on the other hand, was the history of the property and what the conduct of other parties toward it during this period?

1. Consider the *Bracito Grant* to Garcia.

It bore the same name as Heath's, and covered the lower half of the tract as surveyed, its upper boundary being the head of the Bracito Acequia, which was taken as the center of Heath's. (Surv. Gen. Report; Report H. R. 457, first session Thirty-fifth Congress, p. 29; R., 172.)

Up to 1828 occupied by Juan A. Garcia.

After 1828 occupied by Francisco Garcia until expelled by Indians.

1846 Kearny occupied New Mexico.

1848 treaty of Guadelupe Hidalgo.

1849 proceeding by Francisco Garcia, and testimony of witnesses taken.

1851 power of attorney to Stephenson.

1853 suit filed in United States court and testimony.

1854 final decree and survey ordered.

September, 1854, survey made and filed.

July, 1854, act creating surveyor-general for New Mexico.

December 28, 1854, Surveyor-General Pelham arrived at Santa Fe and opened his office. (Report Secretary of Interior, 1856, p. 301.)

January 18, 1855, surveyor-general's proclamation inviting claimants to present their claims. (*Ibid.*, p. 305.)

August 1, 1856, list of documents in archives made by surveyor-general and transmitted to Congress, and published. "No. 834, Grant to John G. Heath." (*Ibid.*, p. 413.)

August 6, 1856. *Bracito claim* of Stephenson *et al.*, filed with surveyor-general. (Rep. H. R. above cited, p. 25, fully describing it by name as "Bracito," on the Rio Grande, Dona Ana County.)

December 31, 1856. Recommended for confirmation by surveyor-general. (*Ibid.*, p. 32.)

February 11, 1857. Reported to Congress by Secretary of Interior. (*Ibid.*, p. 3.)

March 29, 1858. Reported by House Committee on Private Land Claims. (Published in H. R. 457, first session Thirty-fifth Congress, p. 1.)

June 21, 1860. Confirmed by Congress.

1877. Surveyed by United States and platted on public-land surveys.

1880. Marked on maps of New Mexico.

1890. New survey by United States.

2. *Dona Ana Bend grant.* (R., 177.)

1839–1844. Colony established and land distributed to large number of claimants; filed with surveyor-general; approved and recommended for confirmation.

1874. Reported by Secretary of Interior to Congress, published in Ex. Doc. 43, Forty-third Congress, with map, showing the location on Rio Grande, and southwest corner as head of Bracito Acequia.

3. *Mesilla colony grant* (R., 225).

1853. Grant made, and large quantities of land distributed.

1874. Approved and recorded by surveyor-general. Reported to Congress, and published in Ex. Doc. 456.

All the foregoing grants have been surveyed by the United States, and the boundaries thereof marked on the official plats in the surveyor-general's office.

Public-land surveys have been prosecuted within the boundaries claimed from 1858 to 1885.

A large number of entries of land within boundaries claimed have been received in land office.

All land within six and one-half miles of head of Bracito Acequia have been surveyed by the United States either as public land or these grants, thus showing assertion of dominion either by other grantees or the United States *of all* the land embraced within the Heath claim.

Under these various grants and entries of public land large and populous settlements have been made, until there is now within the limits claimed for the Heath grant a population of several thousand people, many of whom, and their predecessors, have had possession, under adverse titles, for more than sixty years.

Against all these acts, thus open, notorious, and advertised in all public ways, there has been not a word of protest or objection from Heath or his heirs from 1824 to 1892.

With these facts in evidence, and after a lapse of sixty-eight years, claimants bring forward their claim for the first time, after all the men of that day are dead, and when nobody is living to tell of the event but those who were children of nine to fifteen years. And they do this without producing the original archive, or the *testimonio*, or accounting for the absence of either; but seek to prove the grant by secondary evidence, with the very copy which bears the evidence of submission to and disapproval by the superior authority.

Upon such an array of facts not only do all presumptions in favor of the validity of acts done or the continued existence of the claim vanish into thin air, but

presumptions against it arise, as matters of law, which are completely decisive of this case.

Out of the multitude of authorities, we have selected a few cases, not so much to show what the law is in this respect, as to show the scope and extent of its application.

"Lapse of time, when it does not operate as a statutory or positive bar, operates by way of evidence, and may create a presumption that parties have waived or abandoned their rights." (12 Amer. and Eng. Encycl. of Law, 542, and numerous cases cited in the notes.)

Akins v. *Hill*, 7 Ga., 573, 577.
Giles v. *Baremore*, 5 Johns., Chy., 545.
Prevost v. *Gratz*, 6 Wheaton, 481, 504.
United States v. *Moore*, 12 How., 209.
Gaines v. *Miller*, 111 U. S., 399, 400.
Fletcher v. *Fuller*, 120 U. S., 544.

In *Akins* v. *Hill* (7 Ga., 573, 577) the court said:

> There is no principle of equity sounder, more conservative, and more prolific in all the fruits of peace than this, that when one slumbers over his rights, with no impediment to his asserting them, until the evidence upon which a counterclaim, if founded, may from lapse of time be presumed to be lost; until the generation cognizant of the transactions between the parties has passed away, and until original actors are in their graves and their affairs are left to representatives, the law, in the exercise of an equitable sovereignty, presumes it to be unjust that under such circumstances a complainant should be heard; and in nine cases out of ten it is unjust in fact as well as in theory. It is presumed, and the presumption grows out of the principles of human nature developed in universal experience, that men will

use reasonable diligence to get what rightfully belongs to them.

In *Giles* v. *Baremore* (5 Johns. Chy., 545, 551) Chancellor Kent said:

> The presumptions to be drawn by the courts in the case of stale demands are founded in substantial justice and the clearest policy. If the party, having knowledge of his rights, will sit still and without asserting them permit persons to act as if they did not exist, and to acquire interests and consider themselves as owners of the property, there is no reason why the presumption should not be raised. It is, therefore, well settled that the presumption that a demand has been satisfied prevails as much in this court as it does at law. Claims the most solemnly established on the face of them will be presumed to be satisfied after a certain length of time. Matters of record, deeds, and even a private statute, may be presumed to make a good title. The presumption resolves itself into this, that a man will naturally enjoy what belongs to him. These are principles of decision adopted and sanctioned in a variety of cases and by a succession of learned judges in the English court of chancery, and their solidity is not to be questioned.

In *Fletcher* v. *Fuller* (120 U. S., 545) the principle was elaborately stated, as follows:

> In such cases "presumptions," as said by Sir William Grant, "do not always proceed on a belief that the thing presumed has actually taken place." "Grants are frequently presumed," as Lord Mansfield says, *Eldridge* v. *Knott*, Cowp., 215, "merely for the purpose and from a principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates, as otherwise titles

must forever remain imperfect and in many respects unavailable, when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." *Hillary* v. *Waller*. 12 Ves., 239, 252.

The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of other engagements and a conviction that they can be readily obtained at any time.

The death of parties may leave in the hands of executors or heirs papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which may take no action; and

4. That he obtained indemnification from the *Ayuntamiento* of El Paso.

5. That he put in his claim against Mexico under the convention of 1839 and obtained compensation.

6. That his claim was adjudicated and extinguished under Articles XIV and XV of treaty of Guadelupe Hidalgo.

7. That he acquiesced in the decision of the provincial deputation disapproving the grant because he became satisfied that the grant was void.

8. That for other reasons he abandoned the grant and all claim under it.

9. That he never went to El Paso with his colony at all.

Respectfully submitted.

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CESSNA v. UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 78. Argued and submitted January 4, 1898. — Decided February 21, 1898.

The decision of the Court of Private Land Claims that the ayuntamiento of El Paso had no power to make a grant, like the one in controversy in this case, entirely outside of the four square leagues supposed to belong to El Paso, and that even if it had such power, the conditions of the alleged grant were never performed by the grantee, and therefore that he acquired no title to the property, was correct.

On January 9, 1893, the appellants as plaintiffs filed their petition in the Court of Private Land Claims, praying that their title to a tract of land in the Territory of New Mexico, and near to the city of El Paso, Texas, be confirmed. The plaintiffs named as defendants, besides the United States, the unknown owners of the Dona Ana Bend Colony, Mesilla Colony and Bracito Grants. The United States as well as certain individuals representing themselves to be the owners of these grants appeared and answered. Thereafter a trial was had, and on June 26, 1895, the court entered a decree, finding that the plaintiffs' claim of a land grant had not been sustained by satisfactory proof, and dismissing the petition. From such decree the plaintiffs brought this appeal.

The facts disclosed by the record, and about which there is little dispute, were substantially as follows: In April, 1823, one Doctor John Heath, or Juan Gid, as his name is written in the Spanish, petitioned the ayuntamiento or general council of El Paso for a grant of a tract of land, which petition was acted upon by the ayuntamiento, and a tract five leagues square was granted to him. This petition was in these words:

"Dr. Don Juan Gid, citizen of the United States of North America, in the best legal form allowed by law, appears before your honorable body and states: That, not having received up to date any answer to the communication of December last of last year, which I presented to the former

ayuntamiento, the predecessor of your honorable body, which (communication), approved in all its parts, was forwarded to His Imperial Majesty by the same, for which reason and because of the increase (ampleacion) of the power which is given to your honorable body by the law of colonization which was issued by the National Instituent Assembly (Junta) of the Empire on the 3d of January of the present year. For these reasons I again have recourse through this, repeating my request to your honorable body, adding that I offer to bring for the settlement of the land of El Bracito, which I ask may be given to me, thirty families of Christian Catholics, and among them blacksmiths, gunsmiths, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors of medicine, and to establish a hospital with its corresponding drug store and proper stock therein, with the necessary instruments for all operations; also to build a warehouse supplied with all kinds of merchandise for wholesale; the necessary machines for the manufacture of cotton and cloth goods, another for the manufacture of gunpowder, offering, until payment of the expense of transportation, to furnish the amount of this article all this jurisdiction may need at the very low price of one dollar per pound; it being first class for the use of arms; with the understanding that in all the said trades there shall be admitted for instruction the youths whose parents may see fit to dedicate them thereto; the children of this country (suelo) having the preference thereto.

"In view of what has been said and because, for establishing the said machinery, utilizing the farms, grazing stock and for the other field interests, it is indispensable that it have the extension which is necessary therefor, it behooves me to demonstrate to your honorable body that the land which may be assigned to me, limiting me to the smallest amount, be at least enough for (sea lo menos para) an hacienda, and that said designation be made for me on both sides, that is to say, that it be on both sides of El Bracito, because the said land being broken it is necessary to leave out various portions of it. I also propose to your honorable body that, until time

permits whatever else may be desirable, this settlement be attached to the parish of this jurisdiction: likewise that the pasture and woodlands be common, with the same privilege as other people of this locality: recommending that it be without prejudice to those farms (sementeras), and that the petitioner be the person to whom is entrusted the distribution of said lands, he being considered the legitimate justice of said families.

"Candor of mind being what I most appreciate, and to join myself with my brethren, the faithful inhabitants of this Empire, living always in the simple peace, in order to dispel all rumors of hatred, I ask your honors that, you being pleased, and in order that the said law of colonization be executed in all its parts, notice of this, my petition, be given to the individuals of this jurisdiction, in order that all these gentlemen who like may better or equal it with a view to the right of preference, in which act your honorable body, to whom is entrusted the power of father of this country (patria), will weigh at their true value, the incalculable benefits that result from my petition whereupon, far from seeking means to deprive it thereof, it would be encouraged in every way to procure their increase.

"Wherefore, I ask and petition your honorable body to be pleased to accede to what I petition, being pleased to pardon the fault that this my petition is not upon paper of the proper seal, for there is none in this place, I being ready to pay the fees that belong to the national treasury. I protest that I do not act in bad faith, and the necessary, etc.

"Paso, April 7th, 1823.

"JUAN GID."

Certain proceedings were had upon this petition, which it is unnecessary to mention in detail.

On April 22 this order was made by the ayuntamiento:

"This ayuntamiento having on this day received that which by its order was to be executed by the commission appointed from its midst to do the surveying that was to be done in the land of El Bracito, this being five leagues in each direction,

the whole of it composing an 'hacienda,' according to article 5 of the colonization plan; which land was granted by this ayuntamiento to Don Juan Gid for the purpose of settlement as stated afterwards, and he being satisfied with what was done in all its parts by the said commission, it was entered as a minute in due witness thereof the president and other members of which that is composed signing it before me, the secretary, to which I certify. José Ygnacio Rascon, José Morales, José Maria Belarde, José Francisco Carbajal, Juan Maria Barela, Antonio Prudencio, José Maria García, Saturnino Aguiar, José Manuel García, Lorenzo Provencio, José Albares.

"JUAN MARIA PONCE DE LEON, *Secretary*."

And on the 25th the following:

"The present expediente in which there has been granted to Don Juan Gid, Anglo-American of the United States, the lands of El Bracito for settlement being considered by this ayuntamiento as closed, proceed to what is to be done under the tariff in force in this ayuntamiento and by its secretary that Juan Gid may know what fees he is to pay for what has been done therein placing the original in the archive as a perpetual testimony, but nevertheless to this shall be sent, together with a certified copy, by the first mail or safe-conduct to the governor of this province for his superior information; another of the same kind being given to the party in interest for his protection. And by the present order the president and members of this corporation so determined and signed it, before me, the secretary, to which I certify. José Ygnacio Rascon, José Morales, José Maria Belarde, José Francisco Carbajal, Saturnino Aguiar, José Manuel García, Lorenzo Provencio.

"JUAN MARIA PONCE DE LEON, *Secretary*."

"It is a copy of the original expediente which on petition of Don Juan Gid was made in order to grant to him for settlement the land of El Bracito, in accordance with the colonization plan, together with what is afterward stated: which original remains accordingly in the archive, to which I certify.

"JUAN MARIA PONCE DE LEON, *Secretary*. [RUBRIC.]"

Statement of the Case.

A copy of these proceedings was sent to the governor of the province, and the following action was taken by the provincial deputation:

"In the session of the 17th of the present month the acting governor of this province, Captain José Antonio Vizcarra, presented to this deputation the reports which your honorable body makes to him in an undated official communication which said chief received; and he also presented another official letter, dated the 26th of last April, accompanied by a copy of the proceedings had by your honorable body in giving to the foreigner Mr. John Heath, at the Bracito, possession of land belonging to the people of that jurisdiction.

"The deputation in the same session resolved to express to your honorable body the surprise it felt at the violent and mistaken procedure with which you conducted yourselves in giving land to foreigners, not only with prejudice to the inhabitants of that jurisdiction, but also in violation of the same law of which your honorable body availed itself in order to carry into effect the possession referred to, thus opening the door to the continual complaints of its people: this deputation refraining from making other observations to your honorable body, on account of the colonization law, which was the moving cause in the concession of the Bracito land to the said Heath having been repealed; but proceeding to direct your honorable body that, in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families that he offers to bring, it should notify the said Heath, through the plenipotentiary of the United States resident in New Mexico, or in some other manner which it may deem more prompt and effective, that the possession which has been given to him at the Bracito, belonging to that jurisdiction of El Paso, was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed.

"And I communicate it to you by direction of the said deputation, with the understanding that I shall communicate to you the decision that may be arrived at when the petition

of Mr. Albo and the other persons of that town shall have been discussed, your honorable body notifying me of the receipt of and compliance with these instructions.

"God preserve your honorable body many years.

"Santa Fé, June 19, 1823, the third year of independence and the second of liberty.

"Francisco Javier Chavez. [scroll.]

"Juan Bautista Vigil. [scroll.]

"*Deputy Secretary.*"

It does not appear that notice of this action of the provincial deputation was at the time communicated to Heath, for soon after the final order of the ayuntamiento he returned to this country and to the State of Missouri, of which State he had theretofore been a citizen, made a disposition of his property, and collected a body of colonists, with whom, in the year 1824, he proceeded to El Paso, with a view of taking possession of this tract of land. Instead of being permitted to occupy the tract, he was banished from the country, forced to abandon the property that he had brought with him, and sent back to the United States a bankrupt. He returned to Missouri, where he lived until he died, in the year 1851. Petitioners claim under him.

The national colonization law of January 4, 1823, under which these proceedings were had, is, so far as it can have any application to the present case, translated by Rockwell (Rockwell's Spanish Laws, p. 617) as follows:

"Art. 1. The government of the Mexican nation will protect the liberty, property and civil rights of all foreigners, who profess the Roman Catholic apostolic religion, the established religion of the Empire.

"Art. 2. To facilitate their establishment, the executive will distribute lands to them, under the conditions and terms herein expressed.

"Art. 3. The empresarios, by whom is understood those who introduce at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the property or resources they

intend to introduce for that purpose; and any other particulars they may deem necessary, in order that with this necessary information, the executive may designate the province to which they must direct themselves; the lands which they can occupy with the right of property, and the other circumstances which may be considered necessary.

"Art. 4. Families who emigrate, not included in a contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

"Art. 5. The measurement of land shall be the following: Establishing the vara at three geometrical feet, a straight line of five thousand varas shall be a league; a square, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two or more sitios; five sitios shall compose one hacienda."

"Art. 7. One labor shall be composed of one million square varas, that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two or more labors. These labors can be divided into halves and quarters, but not less.

"Art. 8. To the colonists, whose occupation is farming, there cannot be given less than one labor, and to those whose occupation is stock raising, there cannot be given less than one sitio.

"Art. 9. The government of itself or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

"Art. 10. Establishments made under the former government which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

"Art. 11. As one of the principal objects of laws in free governments ought to be to approximate, so far as is possible, to an equal distribution of property, the government, taking

into consideration the provisions of this law, will adopt measures for dividing out the lands, which may have accumulated in large portions, in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands to be fixed by appraisers."

"Art. 19. To each empresario, who introduces and establishes families in any of the provinces designated for colonization, there shall be granted at the rate of three haciendas and two labors, for each two hundred families so introduced by him, but he will lose the right of property over said lands should he not have populated and cultivated them in twelve years from the date of the concession. The premium cannot exceed nine haciendas and six labors, whatever may be the number of families he introduces.

"Art. 20. At the end of twenty years the proprietor of the lands, acquired in virtue of the foregoing article, must alienate two thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one third part.

"Art. 21. The two foregoing articles are to be understood as governing the contracts made within six months, as after that time, counting from the day of the promulgation of this law, the executive can diminish the premium as it may deem proper, giving an account thereof to Congress, with such information as may be deemed necessary.

"Art. 22. The date of the concessions for lands constitutes an inviolable law for the right of property and legal ownership; should any one through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

"Art. 23. If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced, in which case the respective ayuntamiento can grant it to another.

"Art. 24. During the first six years from the date of the concession the colonists shall not pay tithes, duties on their produce, nor any contribution under whatever name it may be called.

"Art. 25. The next six years from the same date they shall pay half tithes, and the half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time they shall in all things relating to taxes and contributions, be placed on the same footing with the other citizens."

"Art. 29. Every person shall be free to leave the empire, and can alienate the lands over which he may have acquired the right of property, agreeably to the tenor of this law, and he can likewise take away from the country all his property, by paying the duties established by law."

There is a dispute as to the proper translation of section 4, the original of which is:

"Art. 4. Las familias que por si mismas vengan á establecerse, se presentarán immediatamente al respectivo Ayuntamiento del lugar en que quieran radicarse, para que conforme á las órdenes con que se hallen del Gobierno se les designe por aquel cuerpo el terreno que les corresponda segun la industria que van á plantear;"

and a translation thereof, as furnished by Mr. Tipton, a special agent and Spanish expert of the Department of Justice in the office of the United States attorney for the Court of Private Land Claims, is:

"Art. 4. The families who come of themselves to settle shall present themselves immediately to the respective ayuntamiento of the place at which they desire to establish themselves in order that, in conformity with the orders which they have from the executive, there be designated to them by that body the lands to which they are entitled according to the industry which they are going to undertake."

At the time of the enactment of this colonization law Iturbide was the Emperor of Mexico. Soon thereafter a revolution followed. He abdicated March 20, 1823, and his banishment was ordered by a decree of the Constituent Congress of Mexico, April 23, in these words:

"The Sovereign Constituent Congress of Mexico, in the session of yesterday, decreed the following:

"1. That the coronation of Agustin de Iturbide being an

act of violence and of force, and void in law, there is no occasion to discuss the abdication he makes of the crown.

"2. Consequently, it also declares as void the hereditary succession and the titles that have emanated from the coronation; and that all the acts of the late government, from the 19th of May to the 29th of March last, are illegal, but subject to revision by the present Congress for their confirmation or revocation.

"3. The supreme executive authority will cause the prompt departure of Agustin de Iturbide from the territory of the nation."

Article 10 of the original draft of the treaty of Guadalupe Hidalgo, as agreed upon between the commissioners representing this Government and Mexico, was as follows:

"Art. 10. All grants of land made by the Mexican Government, or by the competent authorities in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the said territories had remained within the limits of Mexico. But the grantees of land in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican Government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfil the said conditions within the periods limited within the same, respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty; in default of which the said grants shall not be obligatory upon the State of Texas in virtue of the stipulations contained in this article. The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid elsewhere than in Texas, put in possession under such grants; and in default of the fulfilment of the conditions of any such grant within the new period, which, as above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void." (Message of the President of the United States, transmitting papers relative to the treaty

of Guadalupe Hidalgo, Feb. 8, 1849, Ex. Doc. 50, H. R. 30th Cong., 2d Sess. p. 17.)

That article, however, was stricken out by the Senate of the United States, and in the message of President Polk the reasons for its rejection are stated in the following language (Ib. 32):

"The objection to the tenth article of the original treaty was not that it protected legitimate titles, which our laws would have equally protected without it, but that it most unjustly attempted to resuscitate grants which had become mere nullities, by allowing the grantees the same period after the exchange of the ratifications of the treaty, to which they had been originally entitled after the date of their grants, for the purpose of performing the conditions on which they had been made. In submitting the treaty to the Senate I had recommended the rejection of this article. That portion of it in regard to lands in Texas did not receive a single vote in the Senate. This information was communicated by the letter of the Secretary of State to the Minister of Foreign Affairs of Mexico, and was in possession of the Mexican Government during the whole period the treaty was before the Mexican Congress, and the article itself was reprobated in that letter in the strongest terms. Besides, our commissioners to Mexico had been instructed 'that neither the President nor the Senate of the United States can ever consent to ratify any treaty containing the tenth article of the treaty of Guadalupe Hidalgo in favor of grantees of land in Texas or elsewhere.' And again, 'should the Mexican Government persist in retaining this article, then all prospect of immediate peace is ended, and of this you may give them an absolute assurance.'"

And in the treaty as ratified, 9 Stat. 922, were left the following provisions which guarantee only the rights of Mexicans to property belonging to them in the territory (9 Stat. 929, art. 8):

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove

at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever. . . . In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

The act creating the Court of Private Land Claims, (Act of March 3, 1891, c. 539, 26 Stat. 854,) provides in section 13, 26 Stat. 860:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

The eighth subdivision of the same section also contains this limitation:

"No concession, grant or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition or requirement was performed within the time and in the manner stated in any such concession, grant or other authority to acquire land."

Mr. Robert Rae and *Mr. J. B. Cessna* for appellants. *Mr. T. B. Catron* was on their brief.

Mr. Solicitor General, *Mr. Special Assistant Attorney General Reynolds* and *Mr. Frank Springer* for appellees submitted on their brief.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The Court of Private Land Claims was of the opinion that the ayuntamiento or town council had no power to make a grant such as this of a tract entirely outside the four square leagues supposed to belong to the town; and, secondly, that even if it had such power the conditions of the alleged grant were never performed by Heath, and therefore he acquired no title to the property.

The colonization law of January 4, 1823, was in force only a short time, having been suspended by the decree of April 11, 1823, and superseded by the law of August 18, 1824. Few proceedings were had under it, and therefore its true meaning cannot be considered as determined by any settled usage of the Mexican authorities. Indeed, counsel for appellants, with all their industry, have been able to find but one other grant made or attempted to be made under its authority. It is, to say the least, difficult to discern in this law any warrant for an original grant by the ayuntamiento. Article 2 provides that "the executive will distribute lands." This is in accord with the settled policy of the old Spanish law, which reserved to the king the power of granting lands. Doubtless this power was often exercised under the directions of the king by subordinate officials, but full control was retained by him. So here the executive retains the control of the distribution of lands. It is true the article provides that such distribution shall be "under the conditions and terms herein expressed," but that simply means the conditions and terms under which the executive will act. Article 3 refers to grants to empresarios, and that specifically declares that they "shall previously contract with the executive," who will "designate the province to which they must direct themselves; the lands which they can occupy." It is said that Heath does not come

within the terms of this article because he did not propose to introduce at least two hundred families, and this contention is doubtless correct. Article 4, upon which the plaintiffs specially rely, makes provision for families who emigrate "not included in a contract," evidently referring thereby to the empresario contracts specified in the preceding section. Such families are directed to "present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish." Accepting the contention of plaintiffs that Heath comes within the scope of this article, we note these limitations: The emigrating families are to present themselves to the ayuntamiento of the "place where they wish to settle," not the ayuntamiento of the town nearest to the land upon which they wish to settle. The natural meaning of this is that when families desire to settle within the limits of a town they shall present themselves to the ayuntamiento of that town for a designation of the lands they may occupy. It would be strange to find that a town council was empowered to grant lands outside the limits of the town and anywhere within the territory or department in which it was situated, while it is not strange to find that council authorized to locate emigrants upon those vacant lands not exceeding four leagues square which, according to Spanish and Mexican custom, were ordinarily appurtenant and subject to the jurisdiction of the town. We do not mean to intimate that El Paso in fact possessed a territory of four square leagues over which it had jurisdiction, although that seems to have been the opinion of the Court of Private Land Claims, for it said: "El Paso, like other Spanish towns, is presumed to have had a grant of four square leagues of land, and the ayuntamiento had the power to make allotments of land within the four leagues so granted."

This matter was considered in *United States* v. *Santa Fe*, 165 U. S. 675, 699, and the conclusion was reached after full examination that it was not true under the Spanish law that every town was entitled to a grant of four leagues square, the

court saying: "The inference to be deduced from all these documents supports the theory that under the Spanish laws, as found in the recopilacion, all towns were not entitled by operation of law to four square leagues, but that at a late date the Spanish officials had adopted the theory that four square leagues was the normal quantity which might be designated as the limits of the new pueblos to be thereafter created."

Still it was undoubtedly true that by special grant or contract many towns did have such an area of contiguous and dependent territory, and it would seem that this article gave the ayuntamiento authority to designate such portion of those lands as it deemed suitable to the industry which the emigrating families proposed to undertake.

We notice another limitation in this article, and that is that the designation by the ayuntamiento is to be made "in conformity with the instructions of the executive." This contemplates, as preliminary to the action of the ayuntamiento, some instructions from the executive, either general or special. Within the letter of this provision the executive might, in a given case, authorize the ayuntamiento of a particular town to designate lands outside of the town lands proper for emigrating families; but surely in this article there is no general grant of power to every town council to give away lands anywhere within the territory or department without any previous instructions or directions from the executive. Neither is the power contended for to be found in article 23, which simply authorizes the ayuntamiento, in case any colonist shall fail to cultivate the land which has been given him, to regrant the same tract to another. It might well be that the ayuntamiento should have power after the lapse of a grant to regrant the same tract to another party. But it does not follow therefrom that the power to regrant lapsed lands implies a power to make an original grant.

Neither is the plaintiffs' case helped by the assertion that the fact of a grant presumes the power to make it. Counsel quote from *United States* v. *Peralta*, 19 How. 343, 347: "The presumption arising from the grant itself makes it *prima facie*

evidence of the power of the officer making it, and throws the burden of proof on the party denying it."

Whatever may be the scope of this proposition, we find in these proceedings a distinct declaration that the town council regarded its action as only preliminary, and requiring for finality the approval of the government. In the first resolution passed by the ayuntamiento on the petition of Dr. Heath it is recited:

"1. That, saving the superior determination of the government to which this shall be given, his proposals and petition are admitted, and when he presents himself, the land he asks for shall be assigned to him in these terms: The head (toma) of the Bracito shall be the central point of the square of said 'hacienda;' that is to say, two and a half leagues in a straight line up the river, and two and a half leagues down the river, the same being observed in the sides that form the square."

And in the letter transmitting the proceedings to the governor it is said:

"The imitative circumstances of the new settlers and the fact that this corporation has no municipal ordinances regulating the distribution of land that may be useful and beneficial in promoting settlement, agriculture, arts, etc., place this corporation under the necessity of making known to your superiority the resolution, that your excellency may be pleased to dictate whatever may be your pleasure in the matter, whether it be by yourself or after consulting the most excellent provincial deputation."

And again —

"In order to avoid jealousies among private individuals and interests of some breeders of stock who generally are prejudicial to these in the development of agriculture, and arts, it is observed that this jurisdiction is just beginning, and at the same time gets poorer and poorer if it is not given or provided with industries and arts, and in order to have them in its territory a means therefor is that adopted by virtue of article 4, inasmuch as to reject it, difficulties would hereafter arise both because of the scarcity in the national exchequer and the poverty of these residents, for whom this ayunta-

miento, to which it very closely belongs to look out for their happiness, has without delay, put in operation the franchise of the law; this corporation stating, nevertheless, that if it has erred in anything, the concession has been made subject to the superior determination.

* * * * *

"This ayuntamiento has found it convenient and worthy of public confidence to bring all of the foregoing before your excellency and the most excellent provincial deputation, that you may, in view thereof, order what may be just and convenient to remove uncertainties and to proceed with certainty in every matter, which is what is desired."

So that the ayuntamiento assuming to act declared specifically that it did so "subject to the superior determination," and submitted its action to the governor of the province.

Further, on the receipt of this communication by the acting governor, it was presented to the provincial deputation, which expressly disapproved the proposed grant, and directed that notice of its disapproval should be promptly communicated to Dr. Heath. The language of the resolution passed by the provincial deputation is clear. It declares that the action taken by the ayuntamiento was not only with prejudice to the inhabitants of that jurisdiction, but also in violation of law. It is true that it does not point out wherein the violation of law consists, and refrains from further observations on account of the repeal of the colonization law, but it does direct the ayuntamiento to give notice to Heath, through the United States minister, or in some other manner, that the possession given to him was "through a mistaken opinion and wrong understanding in relation to the colonization law already repealed," and that this notice should be given in order to prevent any claim for damages in case Dr. Heath should introduce into the province the families that he had offered to bring. Even if the disapproval had been based solely on the fact that the colonization law of 1823 had been repealed, that would have been sufficient, for whatever might be adjudged the power of the ayuntamiento, and although it might have made a grant without reference to the provincial depu-

tation or the governor of the province, yet, for reasons which to it were satisfactory, it expressly declared that the grant was subject to their approval, and in case that approval was withheld, of course the grant never became operative.

The other case to which counsel refer, in which the ayuntamiento assumed to act under the law of 1823, instead of supporting the contention that it had absolute power in the matter, tends in the other direction, and supports the opposite contention, for in that, as in this, it referred its action for approval to the governor of the province. That case was of a grant of a tract on the left side of the Rio Grande, made to Don José Lerma by this same ayuntamiento of El Paso, the proceedings in respect to which were introduced in evidence. They show that upon the petition of Lerma, on August 23, 1823, the ayuntamiento passed a resolution declaring that it deemed it proper to make the grant, but adding: "Let all that has been done be brought to the knowledge of the most excellent deputation of Chihuahua in order that it may approve this grant, if it be its superior pleasure."

In pursuance of this resolution the application was presented to the deputation of Chihuahua, which on October 10, 1823, approved the proposed grant in the following words:

"Agreeably to the resolution of the enlightened council of the town of El Paso, this most excellent deputation have deemed it proper to approve the grant of all the lands, woods and 'sierras' applied for by the resident Don José Lerma, it being of advantage to the nation to open fields and to form settlements resulting in public utility, that enlightened council being ordered to appoint a commission that shall proceed to survey these lands and to give possession to the party interested, in the name of the supreme powers of the nation, of the lands, 'sierras,' woods and pasturages applied for by him on the left side of the Rio Bravo del Norte."

On the receipt of such approval on October 30, 1823, the ayuntamiento proceeded to pass this resolution:

"Having received the foregoing application and approbation of the most excellent provincial deputation of Chihuahua to granting and putting the resident Don José Lerma in pos-

session of the unimproved lands, woods, pasturages and 'sierras' for which he made application for the purpose of settling on the line of the Rio Bravo del Norte and on the left side from opposite the 'Ojo del Toro,' or be it the 'Sierra de todos Santos,' to the 'Sierra Blanca,' the enlightened council of this town, in compliance with the order of said most excellent deputation, resolved to appoint a commission of respectable and honorable persons who shall proceed to survey and delineate those lands and to put said Don José Lerma in possession thereof."

It also appointed a commission to set off the tract to Lerma. On December 12, 1823, on the report of that commission, it entered the following order:

"The land grant applied for by the resident Don José Lerma being approved by the enlightened council and by the most excellent provincial deputation of the city of Chihuahua, as is evidenced by the foregoing proceedings carried on by the president of the appointed commission, who is also the president of this corporation, let this record be referred to its secretary for taxation of the per diem and writing therein, according to the tariff in force in this council, in order that the party interested may be informed of the fees he must pay."

Even this action did not seem to resolve all doubts as to the validity of this grant, for, in a petition presented by Lerma to the constitutional governor of the State of Chihuahua in 1828, he set forth the action of the ayuntamiento and the provincial deputation in 1823, and the delivery to him of the tract, and then, after alleging that the subsequent ayuntamiento refused to acknowledge the validity of the grant, added:

"In these terms he appeals to your excellency, praying that he be recognized in his rights of ownership of the lands which belonged to him, confirming him in his said property, which was granted to him in order that a settlement be formed in said lands, and that the council of the town of El Paso be notified accordingly. I pray for justice and make the necessary protestation at Paso del Norte, May 12, 1828."

Upon such petition the following action was taken:

"To the president of the council of the town of El Paso del Norte:

"The decree or title of possession ordered to be given by the provincial deputation and the council of El Paso del Norte in the year 1823, whereby fifty leagues of land on the left side of the Rio Bravo were granted to Don José Lerma, has been ratified and confirmed by the second constitutional congress of this State in consideration of distinguished military services rendered to the Republic by the retired lieutenant, José Lerma:

"Therefore, this government considers that the land transferred by the granted bounty is an exclusive property of the said Lerma, ratifying it in all its parts. The council of El Paso del Norte will act accordingly. God and liberty.

"Chihuahua, June 30, 1828."

This order of the governor, as will be seen, did not rest the validity of the grant upon the action of the ayuntamiento, or even upon its action as approved by the provincial deputation, but recited that the title had been ratified and confirmed by the second constitutional congress of the State. So that the only other case in which, as said by counsel, action was taken under this law of 1823 by any ayuntamiento clearly shows that it did not understand that it had absolute power, but that its proceedings required approval by the provincial deputation, or some higher authority. The Court of Private Land Claims was right in its conclusions that no final grant had ever been made to Doctor Heath of the tract in controversy.

But it is unnecessary to rest the case upon this alone, for even if the ayuntamiento had full and final jurisdiction in the premises and had made an absolute and unconditional grant — one beyond the power of any superior authority to disapprove and annul, still we think the judgment of the Court of Private Land Claims was right, because, as indisputably appears from the evidence, when Doctor Heath came with his colonists to take possession of the tract, the Mexican authorities repudiated the alleged grant, denied his rights and practically drove him from the country. Not only that, but, as the record shows, the Mexican government thereafter granted to other parties large portions of the same tract. The disavowal, repudiation, expulsion and subsequent grants were in no respect the irregular acts of a mere mob or other unauthorized parties. They

were the deliberate official proceedings of the duly constituted authorities of the Mexican government. This repudiation commenced in 1824 and continued until the cession of territory to the United States, under the treaty of Guadalupe Hidalgo. During all those years, so far as the record shows, no action was taken by Doctor Heath to enforce his claim or recover damages from the government of Mexico for the alleged wrongs done him. Neither were any proceedings taken by him, or those claiming under him, from the treaty of cession until the presentation of this petition before the Court of Private Land Claims. In other words, for seventy years (more than twenty of which the land was within the dominion of the government of Mexico) this claim was permitted to lie dormant. Other people have passed into possession of parts, at least, of the tract, and are occupying it under subsequent grants from that government. Twice during this lapse of time was provision made for an adjustment of claims of citizens of the United States against the government of Mexico. On April 11, 1839, a convention was entered into between the two nations referring to four commissioners all claims of citizens of the United States against Mexico which had been presented to this government for consideration. 8 Stat. 526. And again, in the treaty of Guadalupe Hidalgo, there was a further provision of like nature. 9 Stat. 922. Article 14 of that treaty released the Mexican government in these words:

"The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed."

The fifteenth article, which created the commission, directed that it should be guided and governed by the principles and rules of decisions prescribed by the first and fifth articles of a prior unratified convention, and in the first of those articles it was provided —

"The said commissioners, thus appointed, shall, in the presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations, and the treaties between the two republics."

So that if Doctor Heath had any claim against the Mexican government on account of being deprived of this alleged grant he could, by a presentation of it under one or the other of these treaties, have received full compensation. The fact that he made no claim is persuasive evidence that he did not understand that what had taken place amounted to a complete grant.

Further, when the United States received this territory under the treaty of Guadalupe Hidalgo they refused to recognize as still valid and enforceable all grants which had been assumed to be made prior thereto by the Mexican authorities. Article 10 as proposed by the commissioners was rejected by this government and stricken out from the treaty. That article not only contemplated binding this government to respect all grants which would have been recognized as valid by the government of Mexico if no cession had been made, but also proposed to give to grantees who had failed to perform the conditions of their grants, and whose failure to perform might be deemed to have avoided the grants, further time to perform the conditions. By the rejection of this article this government distinctly declared that it did not propose to recognize any grants which were not at the time of the treaty of cession recognized by the Mexican government as valid or any whose conditions, either precedent or subsequent, had not been fully performed.

In this respect the action taken was in harmony with the general rule of international law. It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor nation may have theretofore committed upon every individual. There may be an exception when the dis-

possession and wrong of the grantor nation were so recently before the cession that the individual may not have had time to appeal to the courts or authorities of that nation for redress. In such a case perhaps the duty will rest upon the grantee nation, but such possible exception has no application to the present case and in no manner abridges the general rule that among the burdens assumed by the nation receiving the cession is not the obligation to right wrongs which have for many years theretofore been persisted in by the grantor nation. Because Mexico had more than twenty years before the cession forcibly taken from Doctor Heath land that was rightfully his and given part or all of it to other persons it does not follow that when the United States accepted the cession they came under obligations to do that which Mexico had failed to do, place Doctor Heath in possession and restore to him the land of which he had been thus wrongfully deprived. Such action if taken might well expose this government to just claims for compensation in behalf of the subsequent grantees of Mexico, who apparently took no personal part in the wrongs done to Heath. Doctor Heath may have had a claim against Mexico for those wrongs, but he failed to prosecute his claim in the way prescribed, and he cannot now make his failure to pursue such prescribed way a reason for enforcing a title which that nation had refused to recognize. So long as Mexico repudiated his claim to this tract his only recourse was by direct appeal or through the intervention of this government to seek compensation for the property of which he had been deprived. When this government accepted the cession of the territory it did not thereby assume an obligation to satisfy any pecuniary demands which he as an individual may have had against the Mexican government. In other words, it took that territory bound to respect all rights of property which the Mexican government respected, but under no obligations to right the wrongs which that government had theretofore committed.

But even if there were an obligation on the part of this government, either under the general rules of international law or the terms of the treaty of cession, to recognize plain-

tiffs' claim to this particular tract, yet the time, manner and conditions of enforcing it would depend upon the will of Congress. And in creating the Court of Private Land Claims Congress has prescribed the character of claims which that court may determine and the conditions which must attach to any claim which it may enforce. This claim, even if the grant in its inception was valid, was not one which it was within the province of the Court of Private Land Claims to approve and confirm. The eighth clause of section 13 forbids the confirmation of a grant made upon any condition or requirement, either antecedent or subsequent, unless it appears that such condition and requirement had been performed within the time and in the manner stated in the grant. That certain conditions or requirements were attached to this grant is evident from a perusal of the application and the order. That they were not performed is admitted by plaintiffs. Their contention is that performance was prevented by the Mexican authorities, and having been prevented it should be considered that performance was waived and the title had become absolute. Whatever may be said as to the duty of this government to treat a condition whose performance was prevented by the Mexican authorities as a condition performed does not detract from the proposition that the Court of Private Land Claims is not vested with such power. It is a mere creature of statute with prescribed and limited powers. It has no general equity jurisdiction. It can confirm a grant made upon condition only when such condition was performed. It is not under the statute at liberty to treat anything as equivalent to performance. Cases in which there was no performance of the conditions of the grant are cases which must be considered as reserved by Congress for further action on its part. So that under the terms of the act creating the Court of Private Land Claims, even if there were no other objections to the proceedings, the admitted fact that the conditions and requirements of this grant were never performed is sufficient to justify the ruling of the court in dismissing the petition.

Of course, the observations above made may not be appli-

cable to a case in which the Mexican government had subsequently to the original grant and prior to the cession waived the performance of the conditions. For as it had power in the first instance to make the grant without conditions, its action in subsequently waiving or removing such conditions was equivalent to an original grant without conditions.

We have not deemed it necessary to consider the matter of limitations and laches. That this is an old claim is evident, seventy years having elapsed between its inception and its prosecution. Whether it must also be adjudged a stale claim and beyond judicial recognition need not be determined. The other reasons presented for its rejection are sufficient.

We see no error in the proceedings, and the judgment is

Affirmed.